Supreme Court, U.S.
FILED
99 612 SEP 13 1999
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

WYSONG LASER COMPANY, INC. and
WYSONG AND MILES COMPANY,
Petitioners,

v.

VIDIMOS, INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

AMIEL J. ROSSABI
Counsel of Record
DAVID S. POKELA
ADAMS KLEEMEIER HAGAN
HANNAH & FOUTS, PLLC
Attorneys for Petitioners
701 Green Valley Road
Suite 100
Greensboro, NC 27408
(336) 373-1600

154753

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Can a civil litigant be deprived of a trial of disputed factual issues as a result of the improper application of the law of the case doctrine when the issues held to be the law of the case had not been presented to the court previously?

II. Can a civil litigant be deprived of a trial of disputed factual issues when the improper application of the law of the case doctrine effectuates a *sua sponte* summary judgment ruling under Federal Rule of Civil Procedure 56 in which the civil litigant was not afforded any notice or opportunity to be heard?

PARTIES TO THE PROCEEDING

The parties before the Court of Appeals were Vidimos, Incorporated (as plaintiff) and Wysong Laser Company, Incorporated and Wysong and Miles Company (as defendants).

STATEMENT PURSUANT TO RULE 29.6

Petitioners hereby declare that Wysong and Miles Company was the parent company of Wysong Laser Company, Incorporated. No publicly held company owns 10% or more of the stock of the Petitioners.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	vii
Table of Appendices	xi
Opinions Below	1
Statement of Jurisdiction	1
Rule Involved	1
Statement of the Case	1
A. Summary Of The Procedural History.	1
B. Factual Background.	2
1. Vidimos Purchased A Laser Cutting System From Laser Lab.	2
2. The Laser Cutting System Did Not Work.	3

Contents

		Page
3.	Laser Lab Negotiates With Wysong Laser.	3
4.	The Distributorship Agreement.	4
5.	The Warranties Identified At Exhibit C.	4
6.	Paragraph 9(a) Is the Only Warranty Stated Within The Distributorship Agreement.	5
7.	Vidimos Acknowledges The Scope Of Wysong Laser's Warranty Obligations.	6
8.	The Vidimos Lawsuit.	6
9.	Summary Judgment In Favor Of The Petitioners.	7
10.	The Seventh Circuit Reverses The Grant Of Summary Judgment And Remands.	7
11.	The Petitioners' Second Motion For Summary Judgment.	8
12.	The Trial.	9
13.	The 1999 Appeal.	9

Contents

	Page
Reasons for Granting the Writ	10
I. The Petition Should Be Granted Because The Opinion Below Constitutes A Deviation From The Accepted And Usual Course Of Judicial Proceedings Relating To The Law Of The Case Doctrine And The Notice Requirements Of Rule 56 Of The Federal Rules Of Civil Procedure, Which Deviation Also Places The Opinion Below In Direct Conflict With The *Fountain v. Filson* Decision Of This Court.	11
A. The 1999 Decision Constitutes A Deviation From The Accepted And Usual Federal Procedure Relating To Rule 56 Of The Federal Rules Of Civil Procedure And The Law Of The Case Doctrine And Is In Direct Conflict With *Fountain v. Filson.*	13
1. Treating The Pronouncement On Consequential Damages In The 1996 Decision As Law Of The Case Means That Error Was Committed Below In That Petitioner Was Deprived Of Notice And Opportunity To Be Heard.	14

Contents

Page

2. Because The Issue Of Consequential Damages Was Not Even Before The Court Of Appeals In Connection With The 1996 Decision, The Pronouncement Regarding Consequential Damages In The 1996 Decision Did Not Constitute Law Of The Case. 17

   a. The Issue of Consequential Damages Was Not Before The Court Of Appeals In 1996. 18

   b. Even If The Pronouncement Of The Court Of Appeals In The 1996 Decision On The Issue Of Consequential Damages Was The Law Of The Case, The Court Of Appeals Should Have Reconsidered The Decision. ... 22

II. The Petition Should Be Granted Because The Opinion Below Constitutes A Deviation From The Accepted And Usual Course Of Judicial Proceedings Relating To The Law Of The Case Doctrine On The Issue Of Prejudgment Interest. 24

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

Cases:

Agostini v. Felton, 521 U.S. 203 (1997) 13

Allison v. Ticor Title Ins. Co., 979 F.2d 1187 (7th Cir. 1992) 25

American Nurses Ass'n v. State of Illinois, 783 F.2d 716 (7th Cir. 1986) 15

Arizona v. California, 460 U.S. 605 (1983) 13

Associated Press v. United States, 326 U.S. 1 (1945) 10

Avita v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219 (7th Cir. 1995) 22

Bethesda Lutheran Homes & Services, Inc. v. Leean, 154 F.3d 716 (7th Cir. 1998) 22

Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 152 F.3d 588 (7th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 804 (1999) 22

Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176 (7th Cir. 1993) 23

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 15

Cited Authorities

Page

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) 13

Creek v. Village of Westhaven, 144 F.3d 441 (7th Cir. 1998) 23

Curran v. Kwon, 153 F.3d 481 (7th Cir. 1998) 25

Czapp v. Cox, 179 Mich. App. 216, 445 N.W.2d 218 (1989) 23

D&G Stout, Inc. v. Bacardi Import, Inc., 805 F. Supp. 1434 (N.D. Ind. 1992) 27

Dohm & Nelke, a Div. of Cashin Systems Corp. v. Wilson Foods Corp., 531 N.E.2d 512 (Ind. Ct. App. 3 Dist. 1988) 26

Eden United, Inc. v. Short, 653 N.E.2d 126 (Ind. Ct. App. 1995) 27

Florida v. Rodriguez, 469 U.S. 1 (1984) 11

Fountain v. Filson, 336 U.S. 681 (1949) .. 10, 11, 13, 14

In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992) 23

Local Union 103 v. Indiana Construction Corp., 13 F.3d 253 (7th Cir. 1994) 22

Cited Authorities

	Page
Martinez v. United Auto. Aerospace & Agri. Implement Workers of America, Local 1373, 772 F.2d 348 (7th Cir. 1985)	15
McIntosh v. Groomes, 227 Mich. 215, 198 N.W. 954 (1924)	23
Orley Enterprises, Inc. v. Tri-Pointe, Inc., 206 Mich. App. 614, 522 N.W.2d 896 (1994)	23
Philips Medical Systems Inern.B.V. v. Bruetman, 8 F.3d 600 (7th Cir. 1993)	23
Price v. Litton Systems, Inc., 784 F.2d 600 (5th Cir. 1986)	26
Public Service Co. v. Bath Iron Works Corp., 773 F.2d 783 (7th Cir. 1985)	27
Quern v. Jordan, 440 U.S. 332 (1979)	13
Ram Products Co. v. Chauncey, 967 F. Supp. 1071 (N.D. Ind. 1997)	25, 26
Sawyer v. United States, 831 F.2d 755 (7th Cir. 1987)	15
United States v. Crawley, 837 F.2d 291 (7th Cir. 1988)	18, 19
Williams v. CIR, 1 F.3d 502 (7th Cir. 1993)	23

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 636(c)(3) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1332(a)(3) 2

Rules:

Federal Rule of Civil Procedure 54(d) 7

Federal Rule of Civil Procedure 56 ..... i, 1, 11, 13, 17

United States Supreme Court Rule 10(a) 11

United States Supreme Court Rule 10(b) 11

Other Authorities:

18 JAMES W. MOORE, *ET AL.*, MOORE'S FEDERAL PRACTICE ¶ 134.21(2) (3rd ed. 1999) 13

Restatement (Second) of Conflicts of Law §§ 187, 188 and 207 26

APPENDIX

	Page
Appendix A — Opinion And Judgment Of The United States Court Of Appeals For The Seventh Circuit Dated And Decided June 14, 1999	1a
Appendix B — Judgment Of The United States District Court For The Northern District Of Indiana Dated And Filed December 17, 1998 ...	6a
Appendix C — Order Of The United States District Court For The Northern District Of Indiana, Hammond Division Dated And Entered October 9, 1998	8a
Appendix D — Opinion Of The United States Court Of Appeals For The Seventh Circuit Dated And Decided October 24, 1996	29a
Appendix E — Order Of The United States District Court For The Northern District Of Indiana, Hammond Division Dated And Filed December 22, 1993	41a

Petitioners, Wysong Laser Company, Inc. ("Wysong Laser") and Wysong and Miles Company ("Wysong and Miles"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Vidimos, Incorporated v. Wysong Laser Company, Inc.*, 179 F.3d 1063 (7th Cir. 1999) (App. A). The judgment of the district court in *Vidimos, Incorporated v. Wysong Laser Company, Inc.*, no. 2:92-CV-135 (N.D. Ind. December 17, 1998) is not published (App. B). The order of the district court in *Vidimos, Incorporated v. Wysong Laser Company, Inc.*, no. 2:92-CV-135 AR (N.D. Ind. October 9, 1998) is not published (App. C). The prior opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Vidimos, Inc. v. Laser Lab Ltd., et al. and Wysong Laser Co., Inc. and Wysong & Miles Co.*, 99 F.3d 217 (7th Cir. 1996) (App. D).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on June 14, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 56 is implicated by the decision of the Court of Appeals. However, a *sua sponte* summary judgment ruling is a judicially created procedure not specifically provided for in Rule 56. In addition, the law of the case doctrine is a judicially created doctrine.

STATEMENT OF THE CASE

A. Summary Of The Procedural History.

This action was commenced by Respondent on March 13, 1992 and removed to the United States District Court for the Northern District of Indiana, Hammond Division. *Vidimos,*

Incorporated v. Laser Lab Limited et al. (no. 2:92-CV-135). Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332(a)(3). In December of 1993, the trial court granted summary judgment to the Petitioners. (App. E). On October 24, 1996, the Court of Appeals for the Seventh Circuit reversed the grant of summary judgment and remanded the case to the trial court (the "1996 Decision"). (App. D). On remand, the Petitioners each moved a second time for summary judgment. The trial court denied those motions in most respects due to its interpretation of the 1996 Decision of the Court of Appeals. (App. C).

On November 5, 1998, a jury found Petitioners liable to Respondent for damages in the amount of $185,000. The trial court entered an Order on December 17, 1998, awarding pre-judgment interest in the amount of $213,651.59 to Respondent and entered judgment. (App. B).

The Petitioners timely filed their Notice of Appeal on January 15, 1999. The Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 636(c)(3). On June 14, 1999, the Court of Appeals affirmed the judgment below (the "1999 Decision"). (App. A).

B. Factual Background.

1. *Vidimos Purchased A Laser Cutting System From Laser Lab.*

In November of 1988, Respondent Vidimos, Incorporated ("Vidimos") purchased a laser cutting system from Laser Lab Limited ("Laser Lab"). The laser cutting system consisted of a laser, controller, and several systems for guiding the laser including a laser sub-assembly manufactured by Rofin-Sinar. Laser Lab provided a written warranty to Vidimos for sub-assemblies:

> All mechanical and electronic sub-assemblies are covered by a twelve-month warranty on parts and labor.

The warranty excluded (using poor grammar) coverage for major sub-assemblies while noting that they were warranted by the original manufacturers:

> 6.3 GENERAL
>
> Warranty cost does not include:
>
> Major sub-assemblies manufactured by other firms but integrated into the Laser Lab system are covered by the original manufacturer's warranty. However, all claims should be directed to Laser Lab.

The written warranty was silent with respect to consequential damages.

2. *The Laser Cutting System Did Not Work.*

The laser cutting system was installed in May of 1989, and from the outset failed to work properly. Laser Lab attempted to repair the system, but its efforts failed. By letter dated July 6, 1990, Respondent demanded a refund from Laser Lab of its $345,024 purchase price for the laser cutting system plus all out-of-pocket expenses and other damages including lost revenues. Laser Lab had the system replaced in late 1990, but it continued to malfunction. By letters dated July 20 and September 25, 1990, Respondent threatened legal action against Laser Lab because of the problems with the laser cutter.

3. *Laser Lab Negotiates With Wysong Laser.*

In February of 1991, Laser Lab negotiated with Wysong Laser to make Wysong Laser an exclusive representative for the sale, distribution, and service of Laser Lab systems in North America. During the negotiations prior to March 1, 1991, Laser Lab did not disclose to Wysong Laser that Laser Lab had to replace the original laser sub-assembly in Respondent's laser cutting machine or that Vidimos had threatened in writing to sue over the performance of that laser system. On February 5, 1991, Laser Lab and Wysong Laser agreed that Laser Lab, through its top technical employee, Greg McGann, would remain responsible for all warranty work on Respondent's cutting system.

4. *The Distributorship Agreement.*

On March 1, 1991, Laser Lab entered into a Distributorship Agreement with Wysong Laser making Wysong Laser the exclusive representative for the sale, distribution, and service of Laser Lab systems in North America (the "Distributorship Agreement"). Wysong Laser agreed to perform certain service obligations owed by Laser Lab to existing Laser Lab customers, including Respondent, in Paragraph 4(g) of the Distributorship Agreement which states:

> The Distributor hereby assumes and agrees to perform the Manufacturer's service obligations under the Manufacturer's express repair or replace warranties, *copies of which are attached as Exhibit C hereto*, on the seven (7) laser machines previously sold by the Manufacturer in the Territory prior to March 1, 1991, and the Products being installed at Great Lakes, Inc. and Metal Craft of Maryville, Inc.

(Emphasis added).

5. *The Warranties Identified At Exhibit C.*

Exhibit C is attached to the Distributorship Agreement and indicates that there were seven warranties outstanding for systems already installed and two for systems to be installed in March and April of 1991. Respondent is on the list of Exhibit C of the seven systems already installed. However, no express written warranties are attached to Exhibit C as Paragraph 4(g) indicated they would be.[1] Instead, the parties replaced the written warranties with the following language:

> Warranty equivalent to warranty in Agreement, except where noted.

The "warranty in Agreement", as further discussed below, refers to the warranty in paragraph 9(a) which contains an exclusion of consequential damages.

---

1. Wysong Laser's parent company, Wysong & Miles, guaranteed the Paragraph 4(g) obligations under the Distributorship Agreement

6. *Paragraph 9(a) Is the Only Warranty Stated Within The Distributorship Agreement.*

Paragraph 9(a) states the warranties that Laser Lab was making to Wysong Laser with respect to the parts. It included a twelve-month warranty that the parts would be free from defect of material or workmanship. Moreover, the remedy for breach of the warranty stated in Paragraph 9(a) is repair of the product and replacement of parts utilized in connection with warranty repairs to the product. The warranty specifically limits its scope by eliminating the availability of certain listed remedies including consequential damages:

> The Manufacturer's liability for breach of the above warranty shall in no event exceed the Manufacturer's cost of repairing or replacing defective parts, at its sole option, and in no event shall the Manufacturer be liable for additional damages of any kind, including, without limitation, lost profits, incidental and *consequential damages*, and exemplary or punitive damages . . . THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

(Emphasis added).

The conclusion that the exclusion of consequential damages in paragraph 9(a) applies to Petitioners is further proven by the erroneously excluded testimony of L.C. Lackey ("Lackey"), the former President of Petitioners, regarding the negotiation of the Distributorship Agreement which is summarized as follows:

- The omission of the seven warranties from Exhibit C was intentional because Laser Lab's International Sales Manager, Martin Bonavita ("Bonavita"), had stated to Lackey that the seven referenced warranties were identical to each other *and identical to paragraph 9(a) of the Distributorship Agreement.*

- Wysong Laser and Laser Lab therefore agreed that Wysong Laser's warranty responsibilities to Laser Lab were the same as those stated in paragraph 9(a) of the Distributorship Agreement which contained an exclusion of consequential damages.

Lackey's testimony was not contradicted by Respondent.

7. *Vidimos Acknowledges The Scope Of Wysong Laser's Warranty Obligations.*

Respondent acknowledged in writing that it understood the warranty obligations assumed by Wysong Laser "covers parts, labor and expenses, and all service calls." In accordance with its obligations to service Respondent's Laser Lab system, Wysong Laser responded to Respondent's calls and attempted to repair the system. However, the laser system did not begin to run properly until August of 1992, when problems with its design were fixed by Rofin-Sinar.

8. *The Vidimos Lawsuit.*

On March 13, 1992, Respondent filed this action in Indiana state court against Wysong Laser, Wysong and Miles, and Laser Lab asserting claims of breach of contract, breach of express warranties, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose. The defendants removed the case to federal court based on diversity jurisdiction. On August 31, 1993, the Petitioners each moved for summary judgment contending that:

a. Respondent was not a third-party beneficiary of the Distributorship Agreement between Wysong Laser and Laser Lab;

b. the warranty obligations assumed by Wysong Laser were expressly limited in the Distributorship Agreement and Respondent was seeking recovery for more extensive warranties; and,

c. the Distributorship Agreement disclaimed damages other than those for repair and replacement of parts and

> Respondent was seeking disclaimed consequential damages.

In its Response, Respondent attempted to raise new, unplead claims of assumed duty and promissory estoppel. In their Reply, Petitioners challenged Respondent's claim of assumed duty and promissory estoppel on the grounds of surprise and prejudice.

9. *Summary Judgment In Favor Of The Petitioners.*

On December 22, 1993, the trial court granted summary judgment in favor of Petitioners on all claims. (App. E). On October 12, 1995, while the case remained pending against Laser Lab, the trial court entered final judgment in favor of the Petitioners pursuant to Federal Rule of Civil Procedure 54(d) so that Respondent could appeal the order granting summary judgment to the Petitioners. With Respondent's consent, the claims against Laser Lab were dismissed without prejudice on April 17, 1996.

10. *The Seventh Circuit Reverses The Grant Of Summary Judgment And Remands.*

On October 24, 1996, the Court of Appeals reversed and remanded the case after finding a "genuine issue of material fact concerning Vidimos' right to sue as a third-party beneficiary." (App. D at 34a) (previously referred to herein as the "1996 Decision"). After finding the existence of genuine issues of material fact, the Court of Appeals stated that:

> Neither the original contract between Laser Lab and Vidimos, which imposed [Laser Lab's existing warranty] obligations, nor the contract whereby Wysong assumed those obligations excludes consequential damages.

(App. D at 35a). However, the issue of consequential damages had not been presented to the Court of Appeals. Moreover, Petitioners were never given notice that the Court of Appeals was considering ruling on the issue of consequential

damages. As discussed *infra* in section "I.A.1." of the Argument, if Petitioners had been given notice, Petitioners would have presented their alternative contention that the Distribution Agreement may have been ambiguous on the issue of the exclusion of consequential damages, but any perceived ambiguity could be resolved by proof (*i.e.*, Lackey's testimony) that the intention of the parties was that Petitioners were covered by the exclusion of consequential damages in paragraph 9(a) of the Distribution Agreement.

11. *The Petitioners' Second Motion For Summary Judgment.*

Upon remand, after further discovery, the Petitioners filed a second Motion for Summary Judgment on May 5, 1998. On October 9, 1998, United States Magistrate Judge Andrew P. Rodovich granted in part and denied in part the Motion for Summary Judgment. (App. C). Specifically, the trial court found, as a matter of law, that Respondent was an intended third-party beneficiary of the Distributorship Agreement allowing Respondent to assert a breach of contract claim against Petitioners for breach of warranty obligations. (App. C at 18a). The trial court essentially concluded that the Court of Appeals had already determined that Respondent was a third-party beneficiary to the Distributorship Agreement unless the Petitioners could disprove that status with additional evidence.

With respect to Petitioners' argument that it had only agreed to perform Laser Lab's existing warranty obligations to the extent specified in paragraph 9(a) of the Distributorship Agreement, the trial court noted that the Distributorship Agreement provided exactly that, and that the trial court had agreed with Wysong Laser that the Distributorship Agreement limited Wysong Labor's warranty obligations to Respondent, but that the Court of Appeals had disagreed. (App. C at 19a). Consequently, the trial court, without using the phrase "law of the case," believed that the Court of Appeals had ruled, as a matter of law, that the Distributorship Agreement allowed

Respondent to recover consequential damages against the Petitioners. (App. C at 19a).

12. *The Trial.*

Based on its interpretation of the Court of Appeals' 1996 Decision, the trial court refused to admit evidence offered by Wysong Laser regarding Wysong Laser's scope of the warranty obligations. The most important of this evidence was the testimony of Lackey, the former President of Wysong, who had negotiated the Distributorship Agreement. Lackey would have testified that the words "Warranty equivalent to warranty in Agreement . . ." appearing in Exhibit C to the Distributorship Agreement were intended by the parties to refer to the scope of the warranty obligations in Paragraph 9(a) of the Distributorship Agreement. Because Wysong Laser was thus not permitted to contest the scope of the warranty obligations that Respondent claimed Wysong Laser had agreed to and assumed in the Distributorship Agreement, the trial essentially focused on the damages that Respondent claimed it had suffered because the warranty obligations owed to it by Laser Lab had not been fulfilled. Judgment was entered against Petitioners in the approximate amount of $400,000. (App. B).

13. *The 1999 Appeal.*

On June 14, 1999, the Court of Appeals affirmed the judgment below (the "1999 Decision"). (App. A). In doing so, the Court of Appeals held that its pronouncement in the 1996 Decision that Respondent was entitled to consequential damages was the law of the case. (App. A at 3a). The Court of Appeals also held that a purported "concession" by Petitioners relating to the applicability of Michigan law to the issue of prejudgment interest was the law of the case. (App. A at 2a).

REASONS FOR GRANTING THE WRIT

Besides the undeniable significance of this matter to Petitioners in light of the judgment against Petitioners in the approximate amount of $400,000[2] which was the result of error below, this matter also has broader significance to this Court and federal jurisprudence. The pre-trial summary judgment mechanism is a significant innovation under the Federal Rules of Civil Procedure. This Court has recognized that since the impact of a successful summary judgment motion is rather drastic, summary judgment must be used cautiously so that no party is deprived a trial of disputed factual issues. *Associated Press v. United States,* 326 U.S. 1, 6 (1945) (Black, J.). *Sua sponte* summary judgment rulings, although permissible, can potentially lead to a deprivation of a trial of disputed factual issues if notice and an opportunity to be heard are not provided. *Fountain v. Filson*, 336 U.S. 681 (1949). In addition, improper use of the law of the case doctrine can deprive a party of a trial of disputed factual issues. The Seventh Circuit Court of Appeals has erred with respect to these issues and should be reversed.

---

2. Petitioners respectfully point out that contrary to Judge Posner's closing remarks in the 1999 Decision, $400,000 involves more than "modest stakes" to Petitioners. As a further response to Judge Posner's closing remarks, Petitioners' appellate efforts in this matter are not "inconsiderate" — rather, they are an attempt by Petitioners to seek review of issues which should result in a judgment being entered in favor of Petitioners.

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONSTITUTES A DEVIATION FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS RELATING TO THE LAW OF THE CASE DOCTRINE AND THE NOTICE REQUIREMENTS OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE, WHICH DEVIATION ALSO PLACES THE OPINION BELOW IN DIRECT CONFLICT WITH THE *FOUNTAIN v. FILSON* DECISION OF THIS COURT.[3]

By erroneously relying upon the law of the case doctrine, the Court of Appeals deprived Petitioner of notice and an opportunity to be heard in connection with a sua sponte summary judgment ruling by the Court of Appeals on the issue of Respondent's entitlement to consequential damages. Therefore, Petitioners respectfully request that this Petition be granted in order for the Court to exercise its error-correcting supervisory powers. *See Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system, we have supervisory authority and, therefore, must occasionally perform a pure error-correcting function in federal litigation").

In summary, when the Court of Appeals in the 1999 Decision held that its previous pronouncement in the 1996 Decision regarding the availability of consequential damages was the binding law of the case (when it clearly was obiter

---

3. The primary bases of this Petition are interrelated and thus, Petitioners seek review of the opinion below pursuant to Supreme Court Rules 10(a) and 10(b). Essentially, Petitioners contend that the Court of Appeals deviated from the usual course of judicial proceedings that were established by this Court's decision in *Fountain v. Filson*, 336 U.S. 681 (1949) (an appellate court should not reverse a summary judgment and order judgment *sua sponte* for non moving party on the basis of an issue the movant had no opportunity to meet).

dictum), (App. A at 3a), the Court of Appeals effectuated a *sua sponte* summary judgment in the 1996 Decision on the issue of consequential damages. Further, when the Court of Appeals held in the 1999 Decision that its consequential damages pronouncement was the law of the case, the prejudicial error of lack of notice and opportunity to be heard manifested itself. Because Respondent had not moved for summary judgment prior to the 1996 Decision[4] and because the consequential damages issue was not presented to the Court of Appeals in connection with the 1996 Decision, Petitioners were prejudiced by not having been given notice and an opportunity to present evidence and its argument to challenge the *sua sponte* summary judgment ruling on the consequential damages issue. In fact, if Petitioners had known that the Court of Appeals was considering a summary judgment ruling that Respondent was entitled to consequential damages as a matter of law, Petitioners would have presented its alternative argument that genuine issues of material fact existed due to ambiguities in the Distributorship Agreement. To that end, Wysong would have presented testimony that would have resolved any perceived ambiguity in favor of the conclusion that consequential damages had been excluded from the Distributorship Agreement. However, the Court of Appeals deprived Petitioners of those opportunities. By ruling as a matter of law in favor of Respondent on the issue of consequential damages, the Court of Appeals ruled contrary to the intent of the parties.

---

4. As discussed *infra* in section "I.A.2.a." of the Argument, Respondent actually contended that this case should be submitted to a jury.

A. The 1999 Decision Constitutes A Deviation From The Accepted And Usual Federal Procedure Relating To Rule 56 Of The Federal Rules Of Civil Procedure And The Law Of The Case Doctrine And Is In Direct Conflict With *Fountain v. Filson.*

The law of the case doctrine "posits that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case'." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (Brennan, J.) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983) (White, J.)). However, there are several exceptions to this doctrine. One such exception is that the law of the case does not encompass dicta. 18 JAMES W. MOORE, *ET AL.*, MOORE'S FEDERAL PRACTICE ¶ 134.21(2) (3rd ed. 1999); *see also Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (Rehnquist, J.) ("law of the case comes into play only with respect to issues previously determined"). In other words, matters not presented to and decided by the court, and not necessary or essential to the court's decision, are not the law of the case. Additionally, law of the case does not apply where a prior decision is clearly erroneous and would work a manifest injustice. *Agostini v. Felton*, 521 U.S. 203 (1997) (O'Connor, J.).

The Court of Appeals erred in either one of two ways. If the pronouncement on the issue of consequential damages in the 1996 Decision really is the law of the case, then a serious error was committed below in that the consequential damages ruling was a *sua sponte* summary judgment rendered without providing Petitioners with the requisite notice and opportunity to be heard. Otherwise, the holding in the 1999 Decision that the consequential damages pronouncement in the 1996 Decision is the law of the case is improper because it was really dictum since the matter was not presented to the Court of Appeals.

1. ***Treating The Pronouncement On Consequential Damages In The 1996 Decision As Law Of The Case Means That Error Was Committed Below In That Petitioner Was Deprived Of Notice And Opportunity To Be Heard.***

The holding in the 1999 Decision that the consequential damages pronouncement in the 1996 Decision is the law of the case means that the 1996 Decision is not simply a reversal of a grant of Petitioners' motion for summary judgment on other grounds (the third party beneficiary contention), but rather is a grant of partial summary judgment to Respondent on the consequential damages issue. However, Respondent did not make any summary judgment motions, written or otherwise. Consequently, the Court of Appeals could not have made any rulings granting summary judgment to Respondent on any claim or issue unless the Court of Appeals was making its own *sua sponte* motion which it apparently did. In doing so, the Court of Appeals has erred.

The Court of Appeals' *sua sponte* grant of summary judgment in favor of Respondent on the consequential damages issue in the 1996 Decision is inconsistent with the Supreme Court's opinion in *Fountain v. Filson*, 336 U.S. 681 (1949). In *Fountain*, the district court granted defendant's motion for summary judgment against plaintiff's claim that there was a resulting trust on certain realty. The Court of Appeals for the District of Columbia reversed, concluding that the lower court should have considered a personal claim against defendant notwithstanding the absence of a resulting trust. However, in addition to simply reversing the trial court, the Court of Appeals for the District of Columbia directed the entry of judgment against defendant on the personal obligation. Consequently, the Court of Appeals for the District of Columbia rendered a *sua sponte* summary judgment in favor of the non-movant plaintiff. The Supreme Court held that the ruling of the court of appeals was erroneous because it deprived defendant of the opportunity to dispute any of the facts that were material to the personal

liability claim inasmuch as the only claim considered by the district court was the one involving the resulting trust.

This Court has also stated that courts "are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).[5]

The error in this matter is that the Court of Appeals did not provide Petitioners with notice that it was considering granting summary judgment to Respondent on the consequential damages issue, nor did it give Petitioners an opportunity to provide evidence, briefs or oral argument in response to a *sua sponte* motion for summary judgment on that issue. The court's action thus undermined the adversarial nature of our system by, in effect, ordering that summary judgment be entered against a party who had no opportunity to present its evidence and fully brief and argue the issue on which judgment was awarded.

The outcome in this case would have been different if Petitioners had been given notice and an opportunity to be heard. Petitioners have always contended that the Distributorship Agreement excludes consequential damages as a matter of law and, thus, Petitioners were entitled to summary judgment. In the alternative, Petitioners have contended that if the Distributorship Agreement is not clear regarding the exclusion

---

5. Prior to this case, the Seventh Circuit Court of Appeals had considered the damages of *sua sponte* summary judgments. *Sua sponte* summary judgments by district courts are considered hazardous and warrant special caution. *Sawyer v. United States*, 831 F.2d 755, 759 (7th Cir. 1987). *Sua sponte* summary judgments by appellate courts require even more caution because the appellate court has not heard from the trial court on the issue. *See American Nurses Ass'n v. State of Illinois*, 783 F.2d 716, 729 (7th Cir. 1986); *Martinez v. United Auto. Aerospace & Agri. Implement Workers of America, Local 1373*, 772 F.2d 348, 353 (7th Cir. 1985) (court declined to grant summary judgment "without the benefit of the district court's views" and remanded for further proceedings).

of consequential damages, which has been contended by Respondent, then the Distributorship Agreement is ambiguous and the ambiguity can be clarified by parol evidence showing that consequential damages were intended to be excluded. If Petitioners had known that summary judgment against Petitioners was going to be considered on the issue of consequential damages, then Petitioners would have submitted the testimony of L.C. Lackey, the former President of Petitioners. However, because Respondent had not moved for summary judgment, Petitioners did not need to ever come forward with its alternative argument and evidence regarding any perceived ambiguity in the Distributorship Agreement.

Indeed, to resolve any ambiguity at trial (as it would have also done at a properly noticed summary judgment hearing), Petitioners offered the testimony of Lackey. Lackey's testimony was absolutely essential to a fair consideration and resolution of any conflict or ambiguity in the language appearing in Paragraphs 4(g) and 9(a) and Exhibit C of the Distributorship Agreement. Nonetheless, the trial court felt compelled to exclude Lackey's testimony in light of the 1996 Decision. The Court of Appeals never had the benefit of considering the Lackey testimony in connection with the 1996 Decision because any ambiguity in the Distributorship Agreement was not presented by any of the parties to the Court of Appeals.

The exclusion and failure to consider the Lackey testimony is critical. Lackey, as the former President of Petitioners, was personally involved in the negotiations with Laser Lab concerning the Distributorship Agreement. As discussed earlier, Lackey's excluded testimony, as preserved by an offer of proof, is summarized as follows:

- The omission of the seven warranties from Exhibit C was intentional because Laser Lab's International Sales Manager, Martin Bonavita ("Bonavita"), had stated to Lackey that the seven referenced warranties were identical to each other *and identical to paragraph 9(a) of the Distributorship Agreement.*

- Wysong Laser and Laser Lab therefore agreed that Wysong Laser's warranty responsibilities to Laser Lab were the same as those stated in paragraph 9(a) of the Distributorship Agreement which contained an exclusion of consequential damages.

Lackey's testimony was not contradicted by Respondent.

Therefore, although Petitioners contend that the Distributorship Agreement disclaims consequential damages clearly and unambiguously, any perceived ambiguity resulting from the seven missing warranties in Exhibit C is clarified by Lackey's testimony that the omission was intentional, and consequential damages were intended to be excluded.

In sum, had the Court of Appeals given notice of its intent to consider granting a *sua sponte* summary judgment for Respondent, Wysong would have offered the testimony of Lackey and argued that any perceived ambiguity was to be construed in favor of Petitioners. Therefore, Petitioners were materially prejudiced by the Court of Appeals' deviation from the usual and accepted procedures relating to Rule 56 and the law of the case doctrine.

2. ***Because The Issue Of Consequential Damages Was Not Even Before The Court Of Appeals In Connection With The 1996 Decision, The Pronouncement Regarding Consequential Damages In The 1996 Decision Did Not Constitute Law Of The Case.***

Although Petitioners contend that the Court of Appeals erred by depriving Petitioners of notice and opportunity to be heard with respect to the *sua sponte* summary judgment (assuming the applicability of the law of the case doctrine), Petitioners alternatively contend that the Court of Appeals erred in the 1999 Decision by holding that the consequential damages pronouncement in the 1996 Decision was the law of the case. Careful review of this matter reveals that it was not the law of the case because the issue was never presented to the Court of Appeals.

a. *The Issue of Consequential Damages Was Not Before The Court Of Appeals In 1996.*

The Seventh Circuit, before whom this matter had been heard, has provided many definitions for dictum. *See United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) and cases quoted therein. The *Crawley* court indicated that the proper analysis may not be merely focusing upon the definition of dictum:

> An alternative to definition is to ask what is at stake in a definition. What is at stake in distinguishing holding from dictum is that dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject. So, instead of asking what the word "dictum" means, we can ask what reasons there are against a court's giving weight to a passage found in a previous opinion. There are many. One is that the passage was *unnecessary to the outcome* of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome. A closely related reason is that the passage was not an integral part of the earlier opinion — it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion, and, again, may not have been fully considered. Still another reason is that *the passage was not grounded in the facts of the case* and the judges may therefore have *lacked an adequate experiential basis for it*; another, that the *issue addressed in the passage was not presented as an issue*, hence was not refined by the fires of adversary presentation. All these are reasons for thinking that a particular passage was *not a fully measured judicial pronouncement*, that it was not likely to be relied upon by readers, indeed it may

> not have been part of the decision that resolved the case or controversy on which the court's jurisdiction depended (if a federal court).

837 F.2d at 292-93 (emphasis added).

A number of the reasons stated in *Crawley* apply in this case and illustrate why the consequential damages pronouncement was dictum and not law of the case. In 1996, the Court of Appeals was reviewing the trial court's grant of a motion for summary judgment made by Petitioners. (App. D). As discussed earlier, Respondent never made a motion for summary judgment. Petitioners argued that Respondent did not, as a matter of law, have a contractual right to obtain consequential damages against the Petitioners under Exhibit C and Paragraphs 4(g) and 9(a) of the Distributorship Agreement. Respondent did *not* contend that it had a right to consequential damages as a matter of law. In December of 1993, the Magistrate Judge granted summary judgment to Petitioners. (App. E). In doing so, the trial court based its decision on several of Petitioners' arguments, including that Vidimos was not a third-party beneficiary to the Distributorship Agreement. (App. E at 48a-49a). The trial court also ruled that assuming Respondent was a third-party beneficiary to the Distributorship Agreement, Respondent could not recover consequential damages because Petitioner Wysong Laser had only agreed to limited warranty obligations. (App. E at 48a). However, the trial court based its decision only on its interpretation of paragraph 4(g) of the Distributorship Agreement (the court cited that provision) without ever reaching the issue of the proper construction of Exhibit C and Paragraph 9(a) which would have further supported that consequential damages had been excluded. (App. E at 48a).

Respondent appealed the grant of summary judgment to the Court of Appeals. Respondent stated in its Appellant Brief that it wanted the Court of Appeals to decide the following issues:

- Whether Vidimos was a third-party beneficiary of the Distributorship Agreement between Wysong and Laser Lab.

- Whether the District Court erred in refusing to consider theories of liability on the grounds that they were not specifically pled in the complaint.

- Whether there was an issue of fact, precluding summary judgment, as to whether Wysong assumed duties to Vidimos by conduct or representations.

- Whether there was an issue of fact, precluding summary judgment, as to whether Wysong is liable under the doctrine of promissory estoppel.

Quite obviously, Respondent did not present as an issue the proper construction of Exhibit C and Paragraphs 9(a) and 4(g) with respect to consequential damages.

In its written arguments, Respondent briefly addressed the issue that Paragraph 4(g) of the Distributorship Agreement precluded liability for consequential damages. In doing so, Respondent argued that Paragraph 4(g) and Exhibit C of the Distributorship Agreement were:

> so uncertain and vague that they give no definite information as to exactly what was intended regarding duties to customers. There is certainly no information specific enough and definite enough to support summary judgment.
>
> . . . [and that it was] impossible to determine, from the Distributorship Agreement alone, exactly what warranty obligations were owed to customers by Laser Lab and assumed by Wysong.

Respondent argued that the trial court should have allowed a jury to decide the issue because, in essence, there were issues of fact for a jury to decide and it could not be decided as a matter of law. Respondent did not ask for, assert, nor argue that summary judgment was appropriate for it on this

issue. Respondent made only a short mention of Paragraph 9(a) of the Distributorship Agreement and what it said shows unequivocally that Respondent did not believe that Paragraph 9(a) was an issue before the Court of Appeals because Respondent believed (incorrectly) that the trial court had rejected Petitioners' argument that Paragraph 9(a) protected it from liability for consequential damages.

Because Respondent did not assert that the trial court had erred with respect to construing Paragraph 9(a) of the Distributorship Agreement and did not assert that it should be granted summary judgment with respect to the proper construction of Exhibit C and Paragraph 9(a) (or for that matter Paragraph 4(g)) of the Distributorship Agreement, Petitioners did not discuss that issue in its appellate brief. Petitioners limited their response to the issues raised by Respondent.

In the 1996 Decision, the Court of Appeals determined that there were genuine issues of material fact precluding summary judgment for the defendants with respect to whether the parties had intended to make Respondent a third-party beneficiary to the Distributorship Agreement. (App. D at 34a). However, notwithstanding the fact that Respondent took the position on appeal that the Distributorship Agreement was ambiguous, the Court of Appeals added in the 1996 Decision that respondent was not barred from recovering consequential damages. (App. D at 35a).

The Court's pronouncement regarding the availability of consequential damages was obiter dictum because it "was not grounded in the facts of the case" and, therefore, the Court of Appeals "lacked an adequate experiential basis for it." Moreover, the issue of the proper construction or interpretation of Paragraph 4(g) in the context of Exhibit C and Paragraph 9(a) of the Distributorship Agreement "was not presented as an issue" to the Court of Appeals. Consequently, the Court of Appeals' holding could not be a "fully measured judicial pronouncement" on that issue. Indeed, the Court of Appeals was never given an opportunity to hear Lackey's testimony.

Because the issue of the proper construction or interpretation of Exhibit C and Paragraphs 9(a) and 4(g) with respect to consequential damage "was not presented as an issue" to this Court in 1996 and, therefore, was not "refined by the fires of adversary presentation," then that portion of the Court of Appeals' 1996 Decision concerning consequential damages should not be held to be law of the case. Therefore, the Court of Appeals has deviated from the accepted and usual course of federal judicial proceedings in relation to the law of the case doctrine.

b. *Even If The Pronouncement Of The Court Of Appeals In The 1996 Decision On The Issue Of Consequential Damages Was The Law Of The Case, The Court Of Appeals Should Have Reconsidered The Decision.*

If the pronouncement in the 1996 Decision that the Distributorship Agreement did not exclude consequential damages to Respondent is not dictum, but rather is a holding creating law of the case, then the Court of Appeals should have reconsidered the issue in connection with the 1999 Decision.

The limits of the law of the case doctrine are flexible and a court has the authority to reconsider its earlier decision. *Bethesda Lutheran Homes & Services, Inc. v. Leean*, 154 F.3d 716, 719 (7th Cir. 1998); *see, e.g., Local Union 103 v. Indiana Construction Corp.*, 13 F.3d 253, 256 (7th Cir. 1994) ("appellant's reliance on the law of the case is misplaced" because the panel's earlier decision did not fully decide the issues). The Court of Appeals' duty to adhere to the law of the case was "less rigid" where it made the previous decision. *Avita v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995). The standard or basis for determining when a court may re-examine its earlier rulings has been expressed in several ways: "good reasons to depart from the previous decision," *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 152 F.3d 588, 591 (7th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 804 (1999); "justice requires

a contrary result," *Creek v. Village of Westhaven*, 144 F.3d 441, 446 (7th Cir. 1998); "demonstrable errors," *Philips Medical Systems Inern.B.V. v. Bruetman*, 8 F.3d 600, 603 (7th Cir. 1993); "patent errors," *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181 (7th Cir. 1993); "compelling reason," *Williams v. CIR*, 1 F.3d 502, 504 (7th Cir. 1993); and "clear error," *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1291 (7th Cir. 1992).

Whatever the terminology, the evidence in this case plainly shows that the Court of Appeals should have reconsidered the 1996 Decision because of clear error relating to the lack of requisite notice and opportunity to be heard associated with the *sua sponte* summary judgment ruling. In addition, clear error exists because a proper construction of Paragraph 4(g) in connection with Exhibit C and Paragraph 9(a) of the Distributorship Agreement shows that consequential damages were excluded unambiguously as a matter of law. To determine the limits of the warranty obligations agreed to and assumed by Petitioners in the Distributorship Agreement, the Court of Appeals was required to construe the contract to ascertain the intent of the parties. *McIntosh v. Groomes*, 227 Mich. 215, 218, 198 N.W. 954, 955 (1924). The language in the Distributorship Agreement must be construed according to its plain meaning. *Orley Enterprises, Inc. v. Tri-Pointe, Inc.*, 206 Mich. App. 614, 522 N.W.2d 896, 898 (1994). "It is a cardinal principle of construction that a contract is to be construed as a whole . . . that every word in it is to be given effect. . . ." *Czapp v. Cox*, 179 Mich. App. 216, 445 N.W.2d 218 (1989).

The explanation on the merits as to why the Distributorship Agreement excluded consequential damages as a matter of law is as follows: The Distributorship Agreement's provisions concerning the scope of the warranty assumed by Wysong Laser could have been written better, but the plain meaning is nonetheless unambiguous in limiting the scope of the warranty obligations Wysong Laser assumed from Laser Lab. Paragraph 4(g) of the Distributorship Agreement states that Wysong Laser

is assuming the warranty obligations of the written warranties attached at Exhibit C, but no such warranties are attached. Exhibit C indicates that the parties did not intend to attach the written warranties because they agreed that, with respect to the nine listed customers, Wysong Laser was assuming only the warranty obligations shown elsewhere in the Distributorship Agreement. There is only one warranty promise in the Distributorship Agreement — that which Laser Lab extended to Wysong Laser in Paragraph 9(a). Paragraph 9(a) is labeled "*Warranties*" and specifically discusses the warranties for material and workmanship for parts sold by Laser Lab in terms of repair and replacement. Paragraph 9(a) also excludes consequential damages. The exclusion of consequential damages protected Petitioners. This construction is proven by the Lackey testimony offered by Petitioners, which evidence was not contradicted by Respondent.

Therefore, on the merits of whether consequential damages were excluded, it was clear error for the Court of Appeals to have held that consequential damages were not excluded, and the Court of Appeals should have reconsidered the issue and reversed itself.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONSTITUTES A DEVIATION FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS RELATING TO THE LAW OF THE CASE DOCTRINE ON THE ISSUE OF PREJUDGMENT INTEREST.

In the 1999 Decision, the Court of Appeals erroneously states that Petitioners "conceded" in the earlier appeal related to the 1996 Decision that Michigan law governed the prejudgment interest issue. (App. A at 2a). Because the "concession" was repeated by the Court of Appeals in its written 1996 Decision, the Court of Appeals apparently reasoned that the inclusion of the "concession" in the 1996 Decision made it the law of the case. (App. A at 2a).

Contrary to the position of the Court of Appeals, prejudgment interest did not become an issue until this matter was tried in 1998 (after the 1996 Decision). It simply was not an issue before the Court of Appeals with respect to the 1996 Decision. Petitioners never conceded that Michigan law governed the issue of prejudgment interest. Therefore, based on the earlier discussion that the law of the case doctrine does not apply to issues not presented to the Court, the Court of Appeals deviated from the accepted and usual course of judicial proceedings relating to the law of the case doctrine in relation to the prejudgment interest issue.

To the extent that the Court of Appeals believed that Petitioners' concession that Michigan law applies to the Distributorship Agreement is tantamount to a concession that Michigan law governs the prejudgment interest issue, the Court of Appeals committed clear error in extending that concession because the prejudgment interest issue is governed by the warranty rather than the Distributorship Agreement. In diversity cases, an award of prejudgment interest is governed by state law. *Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1201 (7th Cir. 1992). Because the case was based on diversity jurisdiction, the trial court was required to apply Indiana (the forum state) choice-of-law provisions to determine which state's law governed. *Curran v. Kwon*, 153 F.3d 481, 488 (7th Cir. 1998). Paragraph 13(a) of the Distributorship Agreement provides that the "Agreement shall be interpreted and enforced under the laws of the United States . . . and Michigan." However, the sale contract between Laser Lab and Respondent containing the warranty obligations assumed by Wysong Laser is governed by Indiana law because Indiana has the most intimate contact with that contract. *See Ram Products Co. v. Chauncey*, 967 F. Supp. 1071, 1080 (N.D. Ind. 1997).

The courts below erroneously focused on the Distributorship Agreement, which specifically provides for application of Michigan law to it, as the proper contract to analyze under Indiana choice-of-law provisions. Rather, the

courts below should have focused on the warranty between Respondent and Laser Lab which was governed by Indiana law. For a breach of warranty contract dispute, Indiana will apply the law of the forum with the most intimate contacts to the facts of the dispute. *See Ram Products Co. v. Chauncey*, 967 F. Supp. 1071, 1080 (N.D. Ind. 1997).

Respondent was enforcing its rights under the warranty agreement between it and Laser Lab *through* the vehicle of the Distributorship Agreement. Since Respondent is vindicating rights under the warranty agreement and receiving damages for the vindication of those rights, the warranty, rather than the Distributorship Agreement is the proper contract upon which to focus when trying to determine whether prejudgment interest should be allowed for consequential damages flowing from the breach of warranty obligations.

The fact that the Distributorship Agreement is properly interpreted and enforced under Michigan law does not mean that the courts below must apply Michigan law to the issue of prejudgment interest. The Restatement (Second) of Conflicts of Law takes an "issue by issue approach" to analyzing which state's law applies. *See Price v. Litton Systems, Inc.*, 784 F.2d 600, 608 (5th Cir. 1986); *see also* Restatement (Second) of Conflicts of Law §§ 187, 188 and 207.

Indiana has the most intimate and significant contacts with the warranty contract and the dispute over the failure to perform its obligations. Respondent entered into the warranty in Indiana, Respondent is located in Indiana, the laser cutting machine has always been used by Respondent in Indiana and, therefore, all of the problems with the operation of and warranty repairs on that machine have taken place in Indiana, Respondent filed suit in Indiana, the case was tried in Indiana, and the damages were suffered by Vidimos in Indiana. Consequently, Indiana law must apply. *Dohm & Nelke, a Div. of Cashin Systems Corp. v. Wilson Foods Corp.*, 531 N.E.2d 512, 513-14 (Ind. Ct. App. 3 Dist. 1988).

Indiana law does not allow prejudgment interest where the damages calculation requires subjective, debatable, disputable judgments and assumptions. *Public Service Co. v. Bath Iron Works Corp.*, 773 F.2d 783, 796-97 (7th Cir. 1985); *D&G Stout, Inc. v. Bacardi Import, Inc.*, 805 F. Supp. 1434, 1452 (N.D. Ind. 1992); *Eden United, Inc. v. Short*, 653 N.E.2d 126, 134 (Ind. Ct. App. 1995).

In this case, the Respondent's only damages expert, Michael Jones, admitted in his testimony that he based his damage computations on various assumptions (for which he did not appear to have a sound basis in fact) and arrived at his damage figures only through the exercise of his accounting "judgment". Moreover, Jones testified that many of his calculations were based on assumptions he made from evidence that did not exist until years after the alleged damages were incurred. Consequently, his damage calculations could not possibly have been "ascertainable in accordance with fixed rules of evidence and accepted standards of valuation *at the time damages accrue*." *Public Service*, 773 F.2d at 796-97 (emphasis added).

The jury plainly exercised its subjective judgment in arriving at a damage figure which was vastly different than the damages numbers calculated by Mr. Jones. The damages were subject to too much subjective, disputable, debatable judgment to merit prejudgment interest under Indiana law.

Consequently, the Court of Appeals' holding in the 1999 Decision that the purported "concession" by Petitioners that Michigan law governed the issue of prejudgment interest resulted in prejudicial error due to a deviation from the accepted and usual judicial proceedings relating to the law of the case doctrine which was improperly applied in connection with the prejudgment issue.

CONCLUSION

This case presents important procedural questions concerning the law of the case doctrine and *sua sponte* summary judgment rulings. The misuse of the law of the case doctrine and *sua sponte* summary judgment rulings, in an effort to expediently dispose of a case, can deprive a civil litigant of the right to have a trial of disputed factual issues. If the opinion below is allowed to stand, Petitioners will have been denied a trial on the issue of whether consequential damages were excluded from the Distributorship Agreement. By granting this Petition, the Court can correct the Court of Appeals' decision, which conflicts with this Court's rulings regarding *sua sponte* summary judgment rulings and conflicts with the law of the case doctrine. In so doing, this Court can reaffirm the necessary and important requirements of providing notice and an opportunity to be heard prior to a *sua sponte* summary judgment ruling and reaffirm the limits of the law of the case doctrine.

Accordingly, Petitioners Wysong Laser and Wysong and Miles respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

AMIEL J. ROSSABI
Counsel of Record
DAVID S. POKELA
ADAMS KLEEMEIER HAGAN
HANNAH & FOUTS, PLLC
Attorneys for Petitioners
701 Green Valley Road
Suite 100
Greensboro, NC 27408
(336) 373-1600

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED JUNE 14, 1999

VIDIMOS, INCORPORATED, Plaintiff-Appellee,

v.

WYSONG LASER COMPANY, INC., and Wysong and Miles Company, Defendants-Appellants.

No. 99-1159.

United States Court of Appeals,
Seventh Circuit.

Submitted May 27, 1999.

Decided June 14, 1999.

* * *

Before POSNER, Chief Judge, and COFFEY and KANNE, Circuit Judges.

POSNER, Chief Judge.

This appeal is founded on a misunderstanding of the doctrine of law of the case. The plaintiff (Vidimos) sued the defendants (Wysong, two affiliated corporations that for the sake of simplicity we'll treat as one) for breach of contract, basing federal jurisdiction on diversity of citizenship. The district court granted summary judgment for Wysong. We

reversed and remanded, 99 F.3d 217 (7th Cir.1996), and the case was then tried and resulted in a judgment for Vidimos of $185,000 in damages plus prejudgment interest in excess of $200,000. Wysong has appealed, represented by new counsel who challenge two rulings in our previous opinion that proved decisive in the award of damages and prejudgment interest to the plaintiff on remand. The first is that the contract does not bar consequential damages, and the second is that Michigan law (which allows prejudgment interest in a contract case such as this) governs the parties' dispute.

Vidimos, a metal fabricator, had bought a laser metal-cutting machine from a foreign company called Laser Lab. Later, Laser Lab made a contract with Wysong whereby the latter assumed Laser Lab's warranty obligations to Vidimos. The contract provided that Michigan law would govern any dispute arising out of it. Wysong conceded the validity and applicability of this choice of law provision. We repeated its concession in our previous opinion, id. at 219, 222, and it became the law of the case, that is, the law governing subsequent proceedings (including any subsequent appeal) in this litigation. Vidimos on remand sought, along with damages, prejudgment interest on those damages as a remedy for breach of the contract. Whether it was entitled to prejudgment interest was a disputed issue arising from the contract and therefore governed by the contractual choice of law provision. As Wysong does not so much as mention the law of the case doctrine in connection with the issue of Vidimos's entitlement to prejudgment interest, even in its reply brief — Vidimos having emphatically invoked the doctrine in its appellee's brief — Wysong has forfeited any claim to an exception to the doctrine.

Appendix A

This disposes of the second ground of appeal (indeed shows it to be frivolous), and we turn to the first, which is that the law of the case doctrine should not compel us to reject Wysong's argument that the contract bars an award of consequential damages to Vidimos. We explained in a paragraph of our opinion that the contract on which the plaintiff was suing (unlike a related contract involved in the litigation) did not bar an award of consequential damages. Id. at 219-20. Wysong calls this discussion "dictum," implying that it was inessential to our decision and perhaps therefore not so carefully considered as other parts of the opinion. E.g., United States v. Crawley, 837 F.2d 291 (7th Cir.1988); Wilder v. Apfel, 153 F.3d 799, 803-04 (7th Cir.1998); Patel v. Sun Co., 141 F.3d 447, 462 n. 11 (3d Cir.1998); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1st Cir.1992). We find this argument difficult to understand. The district court had held, as an alternative basis for denying Vidimos relief, that Vidimos could not obtain consequential damages. If the district court was right, there was no point in remanding the case, since those were the only damages that Vidimos was seeking. (Its claim for prejudgment interest would fall with those damages.) The issue of whether it could get them was therefore essential to our decision.

Wysong also argues that our reasoning about the issue of consequential damages was flawed, that we overlooked critical evidence, and that our conclusion was mistaken. But that is the sort of argument that the doctrine of law of the case bars — namely, an argument for reconsideration that is based not on intervening authority, new (and heretofore undiscoverable) evidence, or other changed circumstances

that justify waiver of the doctrine, e.g., Agostini v. Felton, 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); Avitia v. Metropolitan Club, 49 F.3d 1219, 1227 (7th Cir.1995); Evans v. City of Chicago, 873 F.2d 1007, 1013-14 (7th Cir.1989), but on considerations of fact or law that were available when the previous appeal was argued. See People Who Care v. Rockford Board of Education, 171 F.3d 1083, 1088 (7th Cir.1999), and cases cited there. The remedy of a losing party who believes that through oversight or impulsiveness the court has erred is to seek rehearing — which Wysong did not do — rather than to lie in wait and then, years later (two and a half years, to be precise), having lost on remand, to present its argument for reconsideration in a second appeal. United States v. Becerra, 155 F.3d 740, 753 n. 15 (5th Cir.1998); Hanna Boys Center v. Miller, 853 F.2d 682, 687 (9th Cir.1988); United States v. Unger, 700 F.2d 445, 450 (8th Cir.1983); Eubank Heights Apartments, Ltd. v. Lebow, 669 F.2d 20, 22-23 (1st Cir.1982). In a case involving modest stakes, now in its eighth year, such a litigating strategy is inconsiderate to the parties and the judiciary, and will not be allowed to succeed.

AFFIRMED.

Appendix A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITHOUT ORAL ARGUMENT

Date: June 14, 1999

BEFORE: Honorable RICHARD A. POSNER, Chief Judge

Honorable JOHN L. COFFEY, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

No. 99-1159

VIDIMOS, INCORPORATED,

Plaintiff – Appellee

v.

WYSONG LASER COMPANY, INCORPORATED and WYSONG AND MILES COMPANY,

Defendants – Appellants

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. 92 C 135, Andrew P. Rodovich, Magistrate Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA DATED AND FILED DECEMBER 17, 1998

United States District Court
Northern District of Indiana

Case No. 2:92-CV-135

VIDIMOS, INC.

Plaintiff

v.

WYSONG LASER COMPANY, INC. and
WYSONG AND MILES CO.

Defendants

JUDGMENT IN A CIVIL CASE

[X] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, VIDIMOS, INC., and against

the defendants, WYSONG LASER COMPANY, INC. and WYSONG AND MILES CO., and assess damages in the amount of $185,000.00. Plaintiff, VIDIMOS, INC., is awarded prejudgment interest in the amount of $213,651.59. Plaintiff is entitled to recover postjudgment interest at a rate of 4.513% per year compounded annually until satisfaction of the judgment.

Equivalent Coupon Issue Yield: 4.513%

This document is entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

Dated: December 17, 1998 Stephen R. Ludwig, Clerk

By s/ Joan R. Holderman
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION DATED AND ENTERED OCTOBER 9, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Case No. 2:92 cv 135 AR

VIDiMOS, INC.,

Plaintiff

v.

WYSONG LASER COMPANY, INC., and
WYSONG & MILES CO.,

Defendants

ORDER

This matter is before the court on the Motion for Summary Judgment filed by the defendants, Wysong Laser Company, Inc. and Wysong & Miles Company, on May 5, 1998. For the reasons set forth below, the motion is **GRANTED IN PART** and **DENIED IN PART**.

Background

In November, 1988, the plaintiff, Vidimos, Inc., purchased a laser cutting system from Laser Lab. The laser

cutting system consisted of a number of parts including a laser sub-assembly manufactured by Rofin-Sinar. The machine was installed in May, 1989, and from the outset the equipment did not work properly. Laser Lab attempted to repair the system, but its efforts failed and Laser Lab eventually had the system replaced in late 1990.

The written warranty for the laser system provided that "all mechanical and electrical sub-assemblies are covered by a 12 month warranty on parts and labor" and that all of Laser Lab's service engineers were trained for laser repair. Laser Lab also made a number of oral warranties to Vidimos including that the system would meet a production reliability standard of 92% "up time." In January, 1990, Laser Lab acknowledged that it had not provided a working system and extended the express warranty until the machine was working continuously without downtime for 60 days.

On March 1, 1991, Laser Lab entered into a Distributorship Agreement ("Agreement") with Wysong Laser and its parent company, Wysong & Miles, in which Wysong Laser became the exclusive representative for the sale, distribution, and service of Laser Lab systems in North America. Wysong Laser also agreed to assume Laser Lab's existing service obligations on machines previously sold in the United States including the Vidimos system which continued to have defects. Although Wysong Laser responded to Vidimos' calls and attempted to repair the machine, the system did not begin to run properly until August, 1992, when the laser system finally was fixed by Rofin-Sinar.

Appendix C

On March 13, 1992, Vidimos filed this action in state court asserting claims of breach of contract, breach of express warranties, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, assumed duty, and promissory estoppel against Wysong Laser, Wysong & Miles, and Laser Lab. The defendants removed the case to federal court based on diversity jurisdiction. On August 31, 1993, the Wysong defendants moved for summary judgment contending that Vidimos was not a third-party beneficiary of the Agreement between Wysong Laser and Laser Lab. Alternatively, Wysong Laser argued that Vidimos could only recover damages based on the obligations and duties that it agreed to perform under the Agreement. Because it never agreed to accept responsibility for consequential damages, Wysong Laser argued that Vidimos had no basis to assert its claim for lost wages, lost profits, and other compensatory damages. Wysong & Miles, who signed the Agreement as a guarantor of Wysong Laser's obligations, argued that it could not be held liable because Vidimos was not a third-party beneficiary of the guarantee. Finally, the Wysong defendants challenged Vidimos' claims of assumed duty and promissory estoppel on the grounds of surprise and prejudice.

On December 22, 1993, summary judgment was granted in favor of the Wysong defendants on all claims. On October 12, 1995, while the case remained pending against Laser Lab, this court entered final judgment in favor of the Wysong defendants pursuant to Federal Rule of Civil Procedure 54(d) so Vidimos could appeal the order. With Vidimos' consent, the claims against Laser Lab were dismissed without prejudice on April 17, 1996.

Appendix C

On October 24, 1996, the Seventh Circuit reversed and remanded the case after finding "genuine issues of material fact concerning Vidimos's right to sue as a third party beneficiary." *Vidimos, Inc. v. Laser Lab, Ltd.*, 99 F.3d 217, 220 (7th Cir. 1996). In addition, the Seventh Circuit concluded that neither the contract between Laser Lab and Vidimos nor the contract between Wysong Laser and Laser Lab precluded the recovery of consequential damages against Wysong Laser and that Wysong & Miles could be held responsible for Wysong Laser's obligations on the strength of its guarantee. *Vidimos, Inc.*, 99 F.3d at 221. Lastly, the Seventh Circuit instructed this court to consider the merits of Vidimos' claims of promissory estoppel. *Vidimos, Inc.*, 99 F.3d at 223.

On May 5, 1998, the Wysong defendants filed a second motion for summary judgment. In many respects, the arguments raised mirror those of the previous motion because they again argue that Vidimos was not a third-party beneficiary of the Agreement or, alternatively, entitled to recover consequential damages. The defendants also raise a number of contractual defenses which they claim support the dismissal of this action. Finally, the defendants contend that Vidimos has failed to establish all the essential elements of its promissory estoppel claim.

Discussion

The Agreement entered into by Laser Lab and the defendants specifies that it is to be interpreted under the laws of the State of Michigan. Indiana courts generally honor an expressed choice-of-law provision in the absence of

exceptional circumstances. *Kolentus v. Avco Corp.*, 798 F.2d 949, 955 (7th Cir. 1986). Because there are no exceptional circumstances in this case, Michigan law will control the determination of whether Vidimos has a claim for breach of contract against the defendants.

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only if it is demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Sybron Transition Corporation v. Security Insurance Company of Hartford*, 107 F.3d 1250, 1255 (7th Cir. 1997); *Dempsey v. Atchison, Topeka and Santa Fe Railway Company*, 16 F.3d 832, 836 (7th Cir. 1994); *Southmark Corporation v. Cagan*, 999 F.2d 216, 223 (7th Cir. 1993). The burden is upon the moving party to establish that no material facts are in genuine dispute, and any doubt as to the existence of a genuine issue must be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, 90 S.Ct. 1598, 1610, 26 L.Ed.2d 142, 155 (1970); *Oates v. Discovery Zone*, 116 F.3d 1161, 1165 (7th Cir. 1997); *Patel v. Allstate Insurance Company*, 105 F.3d 365, 367 (7th Cir. 1997). A fact is material if it is outcome determinative under applicable law. *Smith v. Severn*, 129 F.3d 419, 427 (7th Cir. 1997); *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1173 (7th Cir. 1997); *Maravilla v. United States*, 60 F.3d 1230, 1233 (7th Cir. 1995). Even if the facts are not in dispute, summary judgment is inappropriate when the information before the court reveals a good faith dispute as to inferences to be drawn from those facts. *Plair v. E.J. Brach & Sons, Incorporated*, 105 F.3d 343, 346 (7th Cir. 1997); *Lawshe v. Simpson*, 16 F.3d 1475, 1478 (7th Cir. 1994);

Dempsey, 16 F.3d at 836. Finally, summary judgment "will not be defeated simply because motive or intent are involved." *Roger v. Yellow Freight Systems, Inc.*, 21 F.3d 146, 148 (7th Cir. 1994). *See also Plair*, 105 F.3d at 347; *United Association of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1268 (7th Cir. 1990). *Cf. Hong v. Children's Memorial Hospital*, 993 F.2d 1257, 1261 (7th Cir. 1993); *Lac Du Flambeau Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 991 F.2d 1249, 1258 (7th Cir. 1993).

In deciding a motion for summary judgment, the trial court must determine whether the evidence presented by the party opposed to the summary judgment is such that a reasonable jury might find in favor of that party after a trial.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.
>
> [T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.
>
> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)

See also: *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 273 (1986); *Sybron Transition Corporation*, 107 F.3d at 1255; *Weinberger v. State of Wisconsin*, 105 F.3d 1182, 1188 (7th Cir. 1997); *Forman v. Richmond Police Department*, 104 F.3d 950, 957 (7th Cir. 1997).

Third-Party Beneficiary Law

The defendants argue that Vidimos was not an intended beneficiary of the Agreement between Laser Lab and Wysong Laser. The Seventh Circuit appeared to resolve this issue in favor of Vidimos when it stated:

> We must look for clues to their realized intentions in the contract itself. The express assumption of existing warranty obligations is such a clue, which together with the incentives that we have mentioned creates a genuine issue of material fact concerning Vidimos's right to sue as a third party. (internal citations omitted)
>
> 99 F.3d at 220

The Seventh Circuit also stated that "[s]ummary judgment was granted prematurely." *Vidimos*, 99 F.3d at 220. This suggests that the defendants still could prevail on a motion for summary judgment if they presented additional evidence concerning Vidimos' right to sue as a third-party beneficiary.

Therefore, it is necessary to reexamine the threshold question of whether Vidimos was a third-party beneficiary of the Agreement between Laser Lab and Wysong Laser.

Appendix C

In Michigan, third-party beneficiary law is governed by M.C.L. §600.1405 which provides in pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

Not everyone who benefits in some way from a contract can be classified as a third-party beneficiary. In *Rieth-Riley Construction Co., Inc. v. Department of Transportation*, 357 N.W.2d 62 (Mich. App. 1984), the court stated:

> As incidental beneficiary has no rights under the contract. A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof. Where the contract is primarily for the benefit of the parties thereto, the mere fact that a third person would be incidentally benefitted does not give him a right to sue for its breach.
>
> 357 N.W.2d at 65

Appendix C

For Vidimos to establish itself as a third-party beneficiary, it must prove that Wysong Laser made a promise to Laser Lab to do something directly for Vidimos' benefit. *First Security Savings Bank v. Aitken*, 573 N.W.2d 307, 313 (Mich. App. 1997). This determination requires an examination of the "form and meaning of the contract itself." *First Security Savings Bank*, 573 N.W.2d at 314; *Dynamic Construction Company v. Barton Malow Company*, 543 N.W.2d 31, 33 (Mich. App. 1995). *See also Taggart v. United States*, 880 F.2d 867, 869 (6th Cir. 1989). The test is objective: a contracting party's motives and subjective intentions are not relevant in determining whether a third-party is a beneficiary under the contract. *Oja v. Kin*, 581 N.W.2d 739, 744 (Mich. App. 1998); *Alcona Community Schools v. State of Michigan*, 549 N.W.2d 306, 307 (Mich. App. 1996). *See also Ridgway v. Ford Dealer Computer Services, Inc.*, 114 F.3d 94, 96 (6th Cir. 1997); *Downriver Internists v. Harris Corporation*, 929 F.2d 1147, 1150 (6th Cir. 1991) ("the contract must indicate with objective clarity that this benefit was intended.").

The Agreement between Laser Lab and Wysong Laser indicates with "objective clarity" that Vidimos was intended to benefit from the Agreement. Paragraph 4(g) of the Agreement stated:

> The Distributor [Wysong Laser] hereby assumes and agrees to perform the Manufacturer's [Laser Lab] service obligations under the Manufacturer's express repair or replace warranties, copies of which are attached as *Exhibit C* hereto, on the seven (7) laser machines previously sold by the Manufacturer . . . .

Appendix C

While the Agreement only refers to the Vidimos laser system generally, Exhibit C lists the Vidimos warranty as one of the seven outstanding warranties that Wysong Laser agreed to assume responsibility for under the Agreement. When read together, one could conclude that Wysong Laser made a promise to do something directly for Vidimos' benefit, namely, to perform the service obligations that Laser Lab originally agreed to perform on the Vidimos laser system.

Wysong Laser maintains that Vidimos is not a third-party beneficiary of the Agreement because the parties agreed that Laser Lab would remain responsible for all warranty work on Vidimos' laser system. Wysong Laser contends that this arrangement originally was made at a meeting on February 5, 1991, and later reaffirmed in a memorandum from Brian Finn, an employee at Laser Lab. In that memorandum, which summarized a June 26, 1991 meeting between Laser Lab and Wysong Laser, Finn indicated to Wysong Laser that the Vidimos warranty was "NOT PART OF THE ORIGINAL WYSONG COMMITMENT" and that "ALL WARRANTY WORK [for Vidimos] TO BE COMPLETED BY LASER LAB STAFF." (*See* Defendants' Exhibit G, Affidavit of L.C. Lackey, ¶¶ 12-13)

The apparent intent of Laser Lab and Wysong Laser to exclude the Vidimos warranty from the Agreement is not reflected anywhere in the Agreement. To consider this arrangement as evidence that Vidimos was not an intended beneficiary of the Agreement not only would violate the parol evidence rule, but it would contravene paragraph 13(j) of the Agreement which states "[t]his Agreement contains the entire understanding between the parties hereto and

supersedes and terminates any or all other investigation, understandings and agreements between them, whether oral or written." (*See* Defendants' Exhibit I, p. 28) Consequently, the Finn memorandum represents nothing more than the subjective intentions of the parties with respect to Wysong Laser's obligations to Laser Lab. Because the objective language of the Agreement provided for the express assumption by Wysong Laser of Laser Lab's existing warranty obligations to Vidimos, Vidimos is an intended beneficiary of the Agreement and can assert a breach of contract claim against Wysong Laser. Based on its guarantee, Vidimos also can assert a breach of contract claim against Wysong & Miles. *See Vidimos*, 99 F.3d at 222.

Notwithstanding Vidimos' status as a third-party beneficiary, the defendants argue that Vidimos can only recover damages based on the obligations and duties it agreed to perform under the Agreement. Because Wysong Laser never agreed to accept responsibility for consequential damages, the defendants contend that Vidimos cannot recover on its claim for lost wages, lost profits, or other compensatory damages.

The clear and unambiguous terms of the contract provided that Wysong Laser would perform Laser Lab's existing service obligations under the express repair or replace warranties. According to L.C. Lackey, former president for both Wysong defendants, Martin Bonavita, a sales manager at Laser Lab, advised him that Laser Lab's obligations were the same as those specified in paragraph 9(a) of the Agreement. (*See* Defendants' Exhibit G, Affidavit of L.C. Lackey, ¶¶ 8-11) This understanding was reflected

in Exhibit C which stated that the express warranty that Wysong Laser agreed to perform was "equivalent to warranty in Agreement, except where noted." Because paragraph 9(a) specifically excluded liability for lost wages, lost profits, and other compensatory damages, Wysong Laser contends that it believed that its liability to Laser Lab was limited solely to the cost of repairing and replacing defective parts.

The defendants made a similar argument in their first motion for summary judgment. This court accepted that argument, but the Seventh Circuit disagreed:

> Neither the original contract between Laser Lab and Vidimos, which imposed those obligations [to provide warranty service], nor the contract whereby Wysong assumed those obligations excluded consequential damages.
>
> 99 F.3d at 221

Although the defendants attempted to avoid this adverse ruling by arguing that the Seventh Circuit had no reason to interpret the phrase "warranty equivalent to warranty," there is reason to believe that the Seventh Circuit did consider the meaning of that phrase and concluded that it did not preclude Vidimos from recovering consequential damages against the defendants.

Next, the defendants raise a number of contractual defenses that they contend warrant the dismissal of the breach of contract claims. As a third-party beneficiary, Vidimos possesses only those rights that Laser Lab would have had

if it were the party bringing suit against the defendants for breach of contract. *See* M.C.L. §400.1405; *Koppers Company, Inc. v. Garling & Langlois*, 594 F.2d 1094, 1098 (6th Cir. 1979) ("A third-party beneficiary stands in the shoes of the promisee."); *Stillman v. Goldfarb*, 431 N.W.2d 247, 251 (Mich. App. 1988); *Riemersma v. Riemersma*, 185 N.W.2d 556, 557 (Mich. App. 1971) ("A third party has only the same rights to enforce the contract as would the promisee."). Thus, Vidimos is subject to any of the contractual defenses that the defendants could have raised if this action had been brought by Laser Lab.

First, Wysong argues that it cannot be held liable for breach of contract because it fully performed its obligations to Laser Lab. Because Wysong Laser agreed to assume Laser Lab's existing warranty obligations, the focus is on whether Wysong Laser fully performed Laser Lab's warrant obligations to Vidimos as contemplated by the terms of the Agreement. According to Lawrence Tetzloff, an employee at Vidimos, Wysong Laser failed to meet its contractual obligation to provide service and warranty work in a workmanlike manner. Tetzloff states that Wysong Laser service personnel came to Vidimos' place of business in an attempt to fix the laser system, but that they were unable to correct or determine the actual cause of the problem with the laser system. (*See* Plaintiff's Exhibit 1, Affidavit of Lawrence Tetzloff, ¶ 10) This evidence is sufficient to create a triable issue of fact on whether Wysong Laser fully performed Laser Lab's service and warranty obligations to Vidimos.

Second, Wysong Laser asserts that it was excused from performing its obligations under the Agreement when Laser

Lab failed to provide the services of Craig McGann, an experienced service technician at Laser Lab, as required by the Agreement. Paragraph 9(c)(ii) of the Agreement, which allegedly formalized this commitment on the part of Laser Lab, makes no reference to McGann. It simply reads that

> the Manufacturer will provide the Distributor at Distributor's facility in Michigan with a highly experienced technical employee, at the Manufacturer's expense, for a period of not less than six (6) months beginning March 1, 1991, to assist in training of the Distributor's service personnel.

Therefore, Laser Lab's failure to provide the services of McGann for six months or more does not necessarily constitute a material breach of the Agreement which would excuse performance of Wysong Laser's obligations to Laser Lab.

Third, the defendants assert that Vidimos' claims are subject to mandatory arbitration under paragraph 13(a) of the Agreement. Under Michigan law, an arbitration agreement is considered an affirmative defense that is subject to waiver. *Campbell v. St. John Hospital*, 455 N.W.2d 695, 598 (Mich. 1990); *Stanke v. State Farm Mutual Automobile Insurance Company*, 503 N.W.2d 758, 760 (Mich. App. 1993). Although waiver of a contractual right is disfavored, a plaintiff may claim such a waiver by showing that the defendant had "knowledge of an existing right to compel arbitration, act[ed] inconsistent with the right to arbitration, and prejudice [would result] from the inconsistent acts." *Burns v. Olde Discount Corporation*, 538 N.W.2d 686, 689

(Mich. App. 1995). In this case, there is little doubt that Wysong Laser, as a party to the Agreement, knew of its existing right to compel arbitration. Also, there is no question that Wysong Laser, by filing two summary judgment motions and participating in extensive discovery, acted inconsistent with this right. Active participation in a proceeding is sufficient to constitute a waiver of a right to arbitrate. *North West Michigan Construction Co., Inc. v. Stroud*, 462 N.W.2d 804, 805 (Mich. App. 1990) (citing examples including: filing an answer without asserting a claim, filing a motion for summary judgment, and utilizing judicial discovery procedures). Based on these facts, Wysong Laser has waived any right to compel arbitration at this stage in the proceedings.

Fourth, the defendants argue that this action must be dismissed because any action by Vidimos against Laser Lab would be time-barred. The question, however, is not whether Vidimos could refile its action against Laser Lab, but whether this action was initiated by Vidimos within the four year statute of limitations allowed by M.C.L. §400.2725. Because Vidimos filed this action on March 13, 1992, less than four years after it purchased the laser system from Laser Lab, this action is not time-barred.

Lastly, the defendants argue that they cannot be held liable for breach of contract because the Vidimos warranty did not cover the laser sub-assembly manufactured by Rofin-Sinar. Laser Lab's warranty with Vidimos provided in part:

> Major subassemblies manufactured by other firms but integrated into the Laser Lab system are

covered by the original manufacturer's warranty. However, all claims should be directed to Laser Lab.

See Defendants' Exhibit A

Absent from this provision is any language that would indicate that the major subassemblies, including the Rofin-Sinar laser sub-assembly, were covered only by the original manufacturer's warranty. Indeed, the warranty between Laser Lab and Vidimos, which provided that "all mechanical and electronic subassemblies are covered by a 12 month warranty on parts and labor," suggests that Laser Lab may have included additional warranties beyond those provided by the major sub-assemblies. Therefore, a question of fact remains as to whether the Vidimos warranty covered the Rofin-Sinar laser sub-assembly. Vidimos also asserts that it experienced problems with other components of its laser cutting system including the ANCA control system and the motion system. These problems alone could serve as the basis for its breach of contract claim against the defendants even if a trier of fact concluded that the Vidimos warranty did not cover the Rofin-Sinar laser sub-assembly.

Promissory Estoppel

"The doctrine of estoppel springs from equitable principles and is designed to aid the law in the administration of justice where, without its aid, injustice might result." *First National Bank of Logansport v. Logan Mfg. Co., Inc.*, 577 N.E.2d 949, 954 (Ind. 1991). To state a claim for promissory estoppel, a plaintiff must establish the following elements: 1) a promise made by the promisor, 2) made with the

expectation that the promisee will rely on the promise, 3) which induces reasonable reliance by the promisee, 4) of a definite and substantial nature, and 5) injustice can be avoided only by enforcement of the promise. *MacLaughlan v. Prudential Insurance Company of America*, 970 F.2d 357, 359 (7th Cir. 1992); *First National Bank of Logansport*, 577 N.E.2d at 954; *Weinig v. Weinig*, 674 N.E.2d 991, 997 (Ind. App. 1996). Most importantly, a plaintiff must demonstrate that he relied on the promise to his detriment. *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 142 F.3d 367, 369 (7th Cir. 1998); *Muncie Industrial Revolving Loan Fund Board v. Indiana Construction Corporation*, 583 N.E.2d 769, 771 (Ind. App. 1992).

"A promise is a voluntary commitment or undertaking by the party making it (the promisor) addressed to another party (the promisee) that the promisor will perform some action or refrain from some action in the future." *Medtech Corporation v. Indiana Insurance Company*, 555 N.E.2d 844, 847 (Ind. App. 1990) (*quoting Woodall v. Citizens Banking Company*, 507 N.E.2d 999, 1000 (Ind. App. 1987)). In this case, it is undisputed that Wysong Laser made a voluntary commitment to provide Vidimos with a one year warranty commencing March 1, 1991, and that Wysong Laser made the promise with the expectation that Vidimos would rely upon it. (*See* Defendants' Exhibit A, Letter of Gary Single dated March 18, 1991). In addition, there is no question that Vidimos reasonably relied upon Wysong Laser's promise when it permitted Wysong Laser service personnel to work on its laser cutting system and deferred its legal right to sue Laser Lab for breach of warranty. There also is no doubt that Vidimos relied upon Wysong Laser's promise to its detriment by incurring a significant amount of damages in

the hope that Wysong Laser finally would repair the machine. (*See* Defendants' Exhibit N) Finally, injustice would result if Vidimos were left without a remedy for the significant damages it incurred in reliance on Wysong Laser's promise.

Although Wysong Laser challenges several of the essential elements of Vidimos' claim, its argument actually concerns the proper measure of damages. Indiana law has adopted the Restatement (Second) of Contracts §90 which provides that "[t]he remedy for breach may be limited as justice requires." *See Jarboe v. Landmark Community Newspapers of Indiana, Inc.*, 644 N.E.2d 118, 121 (Ind. 1994); *First National Bank of Logansport*, 577 N.E.2d at 956. Comment (d) of the Restatement (Second) of Contracts §90 states:

> The same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or to specific relief measured by the extent of the promisee's reliance rather than the terms of the promise . . . Unless there is unjust enrichment of the promisor, damages should not put the promisee in a better position than performance of the promise would have put him.
>
> *Jarboe*, 644 N.E.2d at 121

See also First National Bank of Logansport, 577 N.E.2d at 956. Generally, "[t]he proper remedy is the amount necessary to restore the injured party to the position it would have

occupied had the promise not been made." Thus, if Vidimos can prove that Wysong Laser breached its promise to provide warranty service for its laser cutting system, Vidimos may recover any damages that it incurred in reliance on the promise. *Creative Demos*, 142 F.3d at 369. Contrary to Wysong Laser's assertions, these damages will not be limited necessarily by the terms of the promise, which Wysong Laser contends excluded liability for consequential damages, and will not put Vidimos in a better position than if Wysong Laser had performed its promise. However, Vidimos may not recover damages for its lost profits. *See Creative Demos*, 142 F.3d at 369 ("in Indiana, as in most other states, promissory estoppel does not support lost profits damages.").

Vidimos also seeks to hold Wysong & Miles liable under a theory of promissory estoppel. Wysong & Miles argues that the claim must be dismissed because it never made a promise or representation to Vidimos. In support of its claim against Wysong & Miles, Vidimos points to three promises: a March 5, 1991 letter from Martin Bonavita informing Vidimos that Laser Lab had signed an agreement with Wysong & Miles to handle its existing warranty obligations; a March 18, 1991 letter from Gary Singel in which Wysong Laser promised to provide Vidimos with warranty service for one year; and a series of verbal statements and undertakings by Wysong Laser technicians. Clearly, none of these promises were made by or on behalf of Wysong & Miles and cannot support a claim of promissory estoppel.

Vidimos acknowledges this deficiency by arguing that this court should exercise its equitable power and impose liability on Wysong & Miles by "piercing the corporate veil"

of Wysong Laser. It is well settled that a corporation is treated as a legal entity separate and distinct from its shareholders. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1232-33 (Ind. 1994) (*citing Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 4 L.Ed.2d 629 (1819)); *Gainey v. Gilson*, 48 N.E. 633, 634 (Ind. 1898). Thus, a parent corporation cannot be held liable for the unlawful conduct of its wholly-owned subsidiary. In some cases, however, a court may disregard a corporate entity and impose liability on a corporation's shareholders "where one corporation is so organized and controlled and its affairs are so conducted that it is a mere instrumentality or conduct of another corporation." *Detrick v. Midwest Pipe & Steel, Inc.*, 598 N.E.2d 1074, 1080 (Ind. App. 1992). Courts generally are reluctant to pierce the corporate veil. *National Soffit & Eschutcheons, Incorporated v. Superior Systems, Incorporated*, 98 F.3d 262, 265 (7th Cir. 1996). Consequently, the burden is on the party seeking to pierce the corporate veil to establish "that the corporate form was so ignored, controlled or manipulated that it was only the instrumentality of another and that misuse of the corporate form would constitute a fraud or promote injustice." *National Soffit*, 98 F.3d at 265; *Winkler*, 638 N.E.2d at 1232. Factors to consider include: 1) undercapitalization; 2) absence of corporate records; 3) fraudulent representation by the corporation's shareholders or directors; 4) use of the corporation to promote fraud, injustice, or illegal activities; 5) payment of the corporation's individual obligations; 6) commingling of assets or affairs; 7) failure to observe corporate formalities; or 8) other shareholder acts or conduct ignoring, controlling or manipulating the corporate form. *National Soffit*, 98 F.3d at 265-66; *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994).

Appendix C

Aside from its claim that Wysong & Miles employed the same corporate officers and counsel as Wysong Laser, shared the same Michigan offices, and engaged in regular business dealings with Wysong Laser, Vidimos has produced no evidence that would justify piercing the corporate veil. In particular, there is no evidence that Wysong Laser was undercapitalized or that it failed to keep corporate records or observe corporate formalities. More importantly, there is nothing in the record to suggest that Wysong & Miles used Wysong Laser to make fraudulent representations to Vidimos or incorporated Wysong Laser for the purpose of engaging in fraudulent or illegal conduct against Laser Lab, Vidimos, or any other purchaser of Laser Lab systems. In fact, the undisputed evidence shows that Wysong & Miles formed Wysong Laser for the specific purpose of entering into a legitimate distributorship agreement with Laser Lab. Because the evidence presented by Vidimos establishes nothing more than the typical parent-subsidiary relationship, it would be inappropriate to pierce the corporate veil and impose liability on Wysong & Miles for the breach of any promise made by Wysong Laser. Consequently, the promissory estoppel claim against Wysong & Miles must be dismissed.

For the foregoing reasons, the Motion for Summary Judgment filed by the defendants, Wysong Laser Company, Inc. and Wysong & Miles Company, on May 5, 1998, is **GRANTED IN PART** and **DENIED IN PART**.

ENTERED this 9th day of October, 1998

s/ Andrew P. Rodovich
Andrew P. Rodovich
United States Magistrate Judge

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED OCTOBER 24, 1996

VIDIMOS, INC., Plaintiff-Appellant,
v.
LASER LAB LTD., et al., Defendants,
and
Wysong Laser Co., Inc., and Wysong & Miles Co., Defendants-Appellees.

No. 95-3676.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 16, 1996.

Decided Oct. 24, 1996.

Before POSNER, Chief Judge, and COFFEY and KANNE, Circuit Judges.

POSNER, Chief Judge.

The plaintiff in this diversity suit, Vidimos, Inc., claims to be a third-party beneficiary of a contract between Laser Lab Ltd. and Wysong Laser Co., a contract that includes a guarantee of Wysong's undertakings by its parent, Wysong & Miles Co. (We shall refer to the two companies collectively as "Wysong.") The district court rejected the claim, granting summary judgment for Wysong. Laser Lab and its affiliates are defunct, but remain defendants in the district court. The court entered final judgment in favor of Wysong under

Fed.R.Civ. P. 54(b), thus enabling Vidimos to appeal without having to wait for the formal disposition of its claims against the other defendants. The appeal raises interesting questions concerning both the doctrine of third party beneficiaries and — because Vidimos wishes to add theories of contractual liability not mentioned in its complaint — the limits of notice pleading under the federal civil rules.

In November of 1988 Vidimos, a metal fabricator in northern Indiana, bought for about $400,000 a laser metal-cutting machine from Laser Lab, an Australian manufacturer. The contract of sale included a number of warranties of the performance of the machine. The machine was installed in Vidimos's plant in May of the following year, and from the outset (if, as we are obliged to do, we view the facts as favorably to Vidimos as the record permits) the machine did not work properly. Laser Lab tried to fix it and when these efforts failed replaced it with a new machine, but the new machine did not work either. Finally, in March of 1991, it wrote Vidimos that, lacking the resources in the United States to service its machines properly, it had "signed an agreement with an old established American company, Wysong & Miles Co.," which henceforth would be responsible for distributing, installing, and doing warranty service for Laser Lab's machines in the United States and would "also be responsible for any outstanding warranty commitments to existing customers." Wysong Laser wrote Vidimos confirming a further one-year extension of Laser Lab's warranty and "Wysong Laser's commitment to Vidimos Inc." Vidimos then permitted employees of Wysong Laser to work on its machine and did not object when Laser Lab turned over its U.S. operations to Wysong Laser and

closed its U.S. facilities. Employees of Wysong Laser — who were Laser Lab's former U.S. service personnel flying a new flag — kept trying to fix Vidimos's machine, but without success. Not until August 1992, more than three years after the first machine had been installed, was the replacement machine finally fixed (by another company — not Wysong or Laser Lab) and performing as warranted. Vidimos claims to have lost more than a million dollars in profits as a result of the breach of Laser Lab's warranty. Laser Lab is insolvent, so Vidimos seeks to recover its loss from Wysong under the latter's contract with Laser Lab.

The contract, which provides that Michigan law shall govern any legal disputes arising out of it, appoints Wysong Laser the exclusive distributor in North America of laser machine tools manufactured by Laser Lab. Along with the standard undertakings of an exclusive distributor, Wysong Laser "assumes and agrees to perform [Laser Lab's] service obligations under [Laser Lab's] express repair or replace warranties" on machines previously sold in North America, including the machine sold to Vidimos. Laser Lab in turn warrants that the parts it furnishes Wysong Laser will be free from defects. But Wysong Laser's remedy for breach of this warranty (which is expressly in lieu of any other warranties) is limited to the cost of repair or replacement of the defective parts and expressly excludes consequential damages. The contract is signed by Wysong & Miles as well as by Wysong Laser, with the accompanying explanation that one of the purposes for Wysong & Miles's being a signatory is "to guarantee the performance of the obligations of [Wysong Laser] under this Agreement."

Appendix D

The rule allowing someone who is not a party to a contract to sue under it as a "beneficiary" is a relative novelty in the common law (the analogous right of a trust's beneficiary is equitable in its origin), and at first glance invites practical as well as conceptual objections. Contracts often benefit persons besides the signatories, and a breach harms them. To allow all these injured beneficiaries to sue would expose contract promisors to enormous potential liabilities, even for involuntary breaches (which many breaches of contract are), and would be inconsistent with the limitations that tort law imposes on remote liability. See H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928) (Cardozo, C.J.); Edwards v. Honeywell, Inc., 50 F.3d 484 (7th Cir.1995). And how can there be a meeting of the minds between a party and a nonparty? But these puzzles dissipate when attention is shifted to the intentions of the contracting parties. The parties may for their own purposes want to confer a power of enforcing their contract upon a third party. If they make this intention adequately clear in the contract, the concept of freedom of contract becomes a compelling ground for allowing the third party to enforce the contract. The standard clause making a contract binding upon and enforceable by the parties' successors and assigns does just this — vests enforcement power in third parties, often unidentified and unidentifiable at the time the contract is signed (not the case here), "parties" who are not parties to the contract in the normal sense because they did not agree to anything, yet who have the rights of parties. E.g., Commercial Standard Ins. Co. v. Bryce St. Apartments, Ltd., 703 F.2d 904, 907 (5th Cir.1983); International Paper Co. v. Whitson, 571 F.2d 1133, 1138 (10th Cir.1977).

Appendix D

If the facts are as Vidimos believes, the parties to the contract appointing Wysong Laser the exclusive North American distributor of Laser Lab's machines may well have intended Vidimos to be empowered to enforce the contract, specifically the provision in which Wysong Laser assumed Laser Lab's existing warranty obligations. Laser Lab might want Vidimos to have this power in order to reduce the likelihood that Vidimos would sue it for losses resulting from a breach of warranty. Both Laser Lab and Wysong Laser might want Vidimos to have the power in order to dissuade Vidimos from taking steps to block the transfer of Laser Lab's North American operations to Wysong Laser. The transfer disabled Laser Lab from honoring its warranty obligations, and Vidimos conceivably might have treated the transfer as an anticipatory breach of contract, Mich. Comp. L. § 440.2610 [UCC § 2-610]; Paul v. Bogle, 193 Mich.App. 479, 484 N.W.2d 728, 735-36 (1992); 2 E. Allan Farnsworth, Farnsworth on Contracts § 8.21, p. 479 (1990), although an alternative and more plausible interpretation is that the transfer was a permissible delegation of contractual performance. Restatement (Second) of Contracts § 318 (1981).

Of course the fact that the parties to the distribution agreement might have had motives for conferring party status on Vidimos is not proof that they did so. We must look for clues to their realized intentions in the contract itself. Downriver Internists v. Harris Corp., 929 F.2d 1147, 1150 (6th Cir.1991) (applying Michigan law) ("The contract must indicate with objective clarity that this benefit was intended"); Lawson v. Household Bank F.S.B., 20 F.3d 786, 788 (7th Cir.1994). The express assumption of existing

warranty obligations is such a clue, which together with the incentives that we have mentioned creates a genuine issue of material fact concerning Vidimos's right to sue as a third party beneficiary. See Crumady v. "Joachim Hendrik Fisser," 358 U.S. 423, 428, 79 S.Ct. 445, 448, 3 L.Ed.2d 413 (1959); In re Merritt Logan, Inc., 901 F.2d 349, 369 (3d Cir.1990); Armstrong v. Diamond Shamrock Corp., 7 Ohio App.3d 296, 455 N.E.2d 702, 705 (1982).

There is no merit to Wysong's contention that under Michigan law a third party cannot be a third party beneficiary unless the primary purpose of the contract was to benefit him. See Mich. Comp. L. § 600.1405(1). The primary purpose of most contracts is to benefit the signatories. If the parties intend to benefit a third party as well, there is no reason we can think of (and Wysong suggests none) to thwart their intention by reference to the hierarchy of their intentions. Granted, the fact that a third party would be benefited by performance of the contract is not enough to give him the status of a third party beneficiary. Greenlees v. Owen Ames Kimball Co., 340 Mich. 670, 66 N.W.2d 227, 229 (1954); Alcona Community Schools v. State, 216 Mich.App. 202, 549 N.W.2d 356, 357-58 (1996) (per curiam). We explained why earlier. But this is different from insisting that an intended third party beneficiary — as distinct from an incidental, that is, an unintended, beneficiary — be the primary intended beneficiary of the contract. Summary judgment was granted prematurely.

But this cannot be the end of our analysis. Wysong argues that the contract precludes the recovery of consequential damages, and as those are the only damages

that Vidimos seeks there is little point in prolonging this litigation if Wysong is right. Under Michigan law, as generally, consequential damages are available in breach of warranty suits if the standard criterion for an award of such damages — foreseeability — is satisfied. Mich. Comp.L. §§ 440.2714(3), 2715(2)(a) [UCC §§ 2-714(3), 2-715(2)(a)]; Taylor & Gaskin, Inc. v. Chris-Craft Industries, 732 F.2d 1273, 1278 (6th Cir.1984) (applying Michigan law). But the parties to a contract can, within broad limits unlikely to be exceeded in the kind of contract that we have before us, exclude such relief. Mich. Comp. L. § 440.2719(3) [UCC § 2-719(3)]; Kelynack v. Yamaha Motor Corp., 152 Mich.App. 105, 394 N.W.2d 17, 21 (1986); Ralph Shrader, Inc. v. Diamond Int'l Corp., 833 F.2d 1210, 1212 (6th Cir.1987) (applying Michigan law). They clearly did this with respect to a suit by Wysong for breach of warranty by Laser Lab, and Wysong insists that the third party beneficiary's rights cannot rise any higher than those of the express promisee. Wysong would be right if Vidimos were standing in Wysong Laser's shoes and suing on the parts warranty running from Laser Lab to Wysong Laser. It is not. It is suing to enforce the assumption by Wysong Laser of Laser Lab's existing warranty obligations. Neither the original contract between Laser Lab and Vidimos, which imposed those obligations, nor the contract whereby Wysong assumed those obligations excludes consequential damages.

The second contract does require Laser Lab, as a precondition to seeking indemnification from Wysong, to notify Wysong that Laser Lab is being sued under the warranty obligations. The purpose of the requirement is to enable Wysong to assert any defenses that Laser Lab might

have against the suit (unless these are defenses personal to Laser Lab). Vidimos sued both Wysong and Laser Lab, and that was notice enough to Wysong to enable it to assert any defenses that Laser Lab might have.

We must not forget that Wysong & Miles, Wysong Laser's parent, is another defendant, on the strength of its guarantee of its subsidiary's obligations under the contract with Laser Lab. Wysong & Miles argues that even if Vidimos is a third party beneficiary of the rest of the contract, it is not a third party beneficiary of the guarantee. A guarantee is like liability insurance (both are forms of indemnity), and, except in direct-action states, of which Michigan is not one, Mich. Comp. L. § 500.3030, a contract of liability insurance is not enforceable by the victim of the insured's tort under a third party beneficiary theory. Allstate Ins. Co. v. Keillor, 190 Mich.App. 499, 476 N.W.2d 453, 454-55 (1991), rev'd on other grounds, 442 Mich. 56, 499 N.W.2d 743 (1993); Itrich v. Huron Cement Division, 670 F.Supp. 199, 204-05 (E.D.Mich.1987) (applying Michigan law). But the reason, we conjecture, is to protect insurance companies against the antagonism or "deep-pocket psychology" of jurors, Mich. Comp. L. § 500.3030 (forbidding mention of insured status of defendant); Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 682 (7th Cir.1992); Lieberthal v. Glens Falls Indemnity Co., 316 Mich. 37, 24 N.W.2d 547, 549 (1946), rather than anything to do with the theory of third party beneficiaries. For in other settings (and this is one of them) the Michigan courts permit third party beneficiaries to sue to enforce guarantees. Aiton v. Slater, 298 Mich. 469, 299 N.W. 149, 154 (1941); Camelot Excavating Co. v. St. Paul Fire & Marine Ins. Co., 410 Mich. 118, 301 N.W.2d 275,

281 (1981); Director of Bureau of Workers' Disability Compensation v. Durant Enterprises, Inc., 195 Mich.App. 626, 491 N.W.2d 584 (1992) (per curiam); see also Donald v. Liberty Mutual Ins. Co., 18 F.3d 474, 480-81 (7th Cir.1994) (Indiana law). Wysong & Miles guaranteed "the performance of the obligations of [Wysong Laser] under this Agreement," and one of those obligations is the obligation of Laser Lab to Vidimos that Wysong Laser assumed.

The complaint alleges breach of contract and of warranty. Eighteen months after the complaint was filed, however, Vidimos, in response to Wysong's motion for summary judgment and without moving to amend its complaint, argued for the first time that Wysong was liable to it under additional theories — assumed duty and promissory estoppel. The magistrate judge refused to consider the additional theories on the twin grounds that "Vidimos has [1] not presented any justification for the delay in raising these claims [2] nor shown that the defendants should have been on notice of such claims." The first ground is wrong; the second was wrongly applied.

The Federal Rules of Civil Procedure do not require a plaintiff to plead legal theories. La Porte County Republican Central Comm. v. Board of Commissioners, 43 F.3d 1126, 1129 (7th Cir.1994); Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir.1992); Rohler v. TRW, Inc., 576 F.2d 1260, 1264 (7th Cir.1978). With immaterial exceptions, see, for example, Samuels v. Wilder, 871 F.2d 1346, 1350 (7th Cir.1989) (proof of fraud), the rules require only the pleading of a claim, Fed.R.Civ.P. 8(a), here that Wysong broke a promise to fix Vidimos's machine, causing a loss of profits.

So there is no burden on the plaintiff to justify its altering its original theory. Which is not to say that such an alteration is always permissible. If the complaint explicitly or implicitly disclaims certain legal characterizations of the claim, an effort to retract the disclaimer may come as a surprise to the defendant and make it more costly or difficult for him to defend, or may simply protract the lawsuit inexcusably. Or by tacit agreement of the parties a possible interpretation of the complaint may simply not be pursued — the case may develop along quite other lines — and an effort to redirect the case may cause unreasonable delay even if there is no surprise to the defendant. In either of these cases the district court can and should hold the plaintiff to his original theory. E.g., Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1428-30 (7th Cir.1993); Johnson v. Methodist Medical Center, 10 F.3d 1300, 1304 (7th Cir.1993); Labram v. Havel, 43 F.3d 918, 920 (4th Cir.1995); Alley v. Resolution Trust Corp., 984 F.2d 1201, 1208 (D.C.Cir.1993); Evans v. McDonald's Corp., 936 F.2d 1087, 1090-91 (10th Cir.1991).

This is not such a case, at least with respect to promissory estoppel. To begin with, there was no surprise. Unlike the complaint in Evans v. Fluor Distribution Cos., 799 F.2d 364, 367 (7th Cir.1986), Vidimos's complaint fairly breathes promissory estoppel, cf. First National Bank v. Logan Mfg. Co., 577 N.E.2d 949, 954 (Ind.1991), although it does not mention the term — and did not have to. It alleges that Vidimos relied on Wysong's promise to honor Laser Lab's existing warranty obligations by expending resources in cooperating with Wysong's futile efforts at repair and by forgoing (more precisely, deferring) legal remedies. These allegations laid the foundation for a claim of promissory

estoppel. Wysong should not have been surprised to find the claim asserted explicitly in an effort to avoid, by basing liability on a promise expressly addressed to Vidimos, the problems with the third party beneficiary claim that were urged by Wysong as grounds for summary judgment. If Wysong wished to minimize uncertainty concerning the scope of Vidimos's claims, it could have served contention interrogatories.

We are doubtful, though, that Vidimos should be permitted to pursue its "assumed duty" theory. The only cases it cites in support of the theory are Indiana cases; so it must be (in fact clearly is, despite Vidimos's coyness, Tincher v. Greencastle Federal Savings Bank, 580 N.E.2d 268, 273 (Ind.App.1991); H.R. Moch Co. v. Rensselaer Water Co., supra, 159 N.E. at 898-99; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56, pp. 378-79 (5th ed.1984)) a tort theory; for disputes arising from the contract are governed by Michigan law, whereas Indiana law would undoubtedly govern any tort claim arising out of the failure of the machine to perform as warranted. Nothing in the complaint hints at the presence of any tort claims; nor is a tort theory of "assumed duty" the sort of thing every defendant in a contract case is expecting to have thrown at him. The danger of surprise, and of steering the lawsuit into deep and troubled waters, cannot be reckoned trivial. In its reply brief Vidimos argues that the "assumed duty" claim is contractual as well as tortious, because Wysong assumed a duty to use due care to repair the machine by assuming Laser Lab's existing warranty obligations. We cannot see what this theory adds to the third party beneficiary and promissory estoppel theories; and we deplore the mindless proliferation

of legal theories by trial lawyers. But insistence that a legal theory be mentioned in the complaint is not, under a regime of notice pleading, a proper method of case management, so we shall leave it to the district court to decide in the first instance whether Vidimos should be permitted to pursue its "assumed duty" theory of Wysong's liability or barred from doing so on the ground of surprise or delay and consequent prejudice either to the defendants or to judicial economy, and also whether there is any basis for a claim of promissory estoppel against Wysong & Miles as well as against Wysong Laser.

REVERSED AND REMANDED.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION DATED AND FILED DECEMBER 22, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CIVIL NO. H 92-135

VIDIMOS, INC.,

Plaintiff

v.

LASER LAB LIMITED d/b/a LASER LAB U.S.A., INC. and LASER LAB SALES, INC., LASER LAB U.S.A., INC., WYSONG LASER COMPANY, INC., AND WYSONG & MILES CO.,

Defendants

ORDER

This matter is before the court on two Motions for Summary Judgment filed separately by the defendants, Wysong & Miles Co., and Wysong Laser Company, Inc., on August 31, 1993. For the reasons set forth below, the motions are **GRANTED**.

Appendix E

Background

The defendant, Laser Lab, is an Australian corporation which does business through its subsidiaries, Laser Lab (U.S.A.) and Laser Lab Sales (hereinafter collectively referred to as Laser Lab). The plaintiff, Vidimos, Inc. (Vidimos), purchased a laser cutting system from Laser Lab which was installed in May, 1989. The equipment did not work properly, and Laser Lab eventually replaced the system in late 1990.

The written warranty for the laser system provided that "all mechanical and electrical sub-assemblies are covered by a 12 month warranty on parts and labor" and that all of Laser Lab's service engineers were trained for laser repair. (Vidimos Affidavit, Exhibit 1, §6.0, §6.5) Vidimos alleges that Laser Lab also made other oral warranties including that the system would have 92 percent "up time." The parties later agreed to extend the express warranty.

On March 1, 1991, Laser Lab entered into a Distributorship Agreement ("Agreement") with Wysong Laser and its parent company, Wysong & Miles, in which Wysong Laser became the exclusive independent representative for the sale, distribution, and service of Laser Lab's existing systems. Laser Lab's existing service obligations included the Vidimos system which continued to have defects. Wysong Laser responded to Vidimos' calls and attempted to repair the equipment. The laser system did not begin to run properly until August, 1992.

Vidimos originally filed this suit in state court asserting claims of breach of contract, breach of express warranties,

breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose. The defendants removed the case to federal court based on diversity jurisdiction.

Discussion

The Agreement entered into by Laser Lab and the Wysong companies specifies that it is to be interpreted under the laws of the state of Michigan. Indiana courts generally honor an expressed choice-of-law provision in the absence of exceptional circumstances. *Kolentus v. Avco Corp.*, 798 F.2d 949, 955 (7th Cir. 1986). Since no exceptional circumstances exist in this case, Michigan law will control the determination of whether Vidimos has a claim for breach of contract against the Wysong companies.

Motion for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only if it is demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990); *McGraw-Edison v. Walt Disney Products*, 787 F.2d 1163, 1167 (7th Cir. 1986); *Ross v. Franzen*, 777 F.2d 1216, 1220 (7th Cir. 1985); and *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984). The burden is upon the moving party to establish that no material facts are in genuine dispute, and any doubt as to the existence of a genuine issue must be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, 90 S.Ct.

1598, 1610, 26 L.Ed.2d 142, 155 (1970); *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1195 (7th Cir. 1990); and *Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985). A fact is material if it is outcome determinative under applicable law. *Doe v. Small*, 934 F.2d 743, 752 (7th Cir. 1991); *Whetstine v. The Gates Rubber Company*, 895 F.2d 388, 392 (7th Cir. 1990); and *Big O Tire Dealers, Inc.*, 741 F.2d at 163. Even if the facts are not in dispute, summary judgment is inappropriate when the information before the court reveals a good faith dispute as to inferences to be drawn from those facts. *Powers v. Dole*, 782 F.2d 689, 694 (7th Cir. 1986); *Munson*, 754 F.2d at 690; and *Burns v. Rockford Life Insurance Company*, 740 F.2d 542, 546 (7th Cir. 1984). Finally, summary judgment generally is not an appropriate means of resolving questions of motive and intent. *United Association of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1268 (7th Cir. 1990); *Bartman v. Allis-Chalmers Corporation*, 799 F.2d 311, 312 (7th Cir. 1986); and *Munson*, 754 F.2d at 690.

In deciding a motion for summary judgment, the trial court must determine whether the evidence presented by the party opposed to the summary judgment is such that a reasonable jury might find in favor of that party after a trial.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Appendix E

> [T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.
>
> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)

See also: *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 273 (1986); *County of Vernon v. United States*, 933 F.2d 532, 534 (7th Cir. 1991); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 660 (7th Cir. 1991); and *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990).

Third-Party Beneficiary Law

Under Michigan law, a party cannot sue for breach of contract for economic loss unless the privity requirement is met or the party is a third-party beneficiary. *Downriver Internists v. Harris Corporation*, 929 F.2d 1147, 1150 (6th Cir. 1991) (applying Michigan law). Since Vidimos was not a party to the Agreement between Laser Lab and Wysong Laser, it is not in privity with either Wysong Laser or Wysong & Miles. Therefore, in order for Vidimos to recover for breach of contract against either of the Wysong companies, it must prove that it was an intended third-party beneficiary of the contract.

In Michigan, third-party beneficiary law is governed by statute. M.C.L. §600.1405 provides in pertinent part:

Appendix E

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

Thus, under Michigan law, not everyone who benefits in some way from a contract can be classified as a third-party beneficiary. *Rieth-Riley Construction Co., Inc. v. State of Michigan*, 357 N.W.2d 62, 65 (1984). In *Rieth-Riley*, the court stated:

> An incidental beneficiary has no rights under the contract. A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof. Where the contract is primarily for the benefit of the parties thereto, the mere fact that a third person would be incidentally benefit does not give him a right to sue for its breach.
>
> 357 N.W.2d at 65

An objective test must be used to determine whether the promisor agreed to do something directly to or for the alleged

third-party beneficiary; "the contract must indicate with objective clarity that this benefit was intended." *Downriver Internists*, 929 F.2d at 1150.

In its response to the motion for summary judgment, Vidimos contends that Wysong Laser in fact "stepped into the shoes" of Laser Lab and should be held equally liable for the alleged breach of contract of Laser Lab. Vidimos also asserts that by guaranteeing the performance of Wysong Laser, Wysong & Miles also should be held liable.

The contract between Laser Lab and Wysong Laser did not indicate "with objective clarity" that Vidimos was intended to benefit from the Agreement. The Vidimos system only was referred to generally in the Agreement itself and then listed as an "outstanding warranty" in Exhibit C attached to the Agreement. The contract stated:

> The Distributer [Wysong Laser] hereby assumes and agrees to perform the Manufacturer's [Laser Lab] service obligations under the Manufacturer's express repair or replace warranties . . . on the seven (7) laser machines previously sold by the Manufacturer . . .
>
> Affidavit of Stanley C. Sapp, Exhibit 1, ¶ 4(g), p. 5

Vidimos characterizes the test to determine whether a party is a third-party beneficiary to a contract as whether the defendant made a promise to do something to or for the benefit of that party. However, the more precise question is

whether, *in entering into the agreement*, did the promisor (Wysong) intend to do something directly to or for the benefit of Vidimos. To utilize the statutory language, the promise must be "undertaken" to do something directly to or for the claimed third-party beneficiary.

Contrary to the plaintiff's conclusion that in signing the agreement Wysong Laser and Wysong & Miles had undertaken to do something directly for Vidimos, a closer analysis reveals that the Distributorship Agreement, namely the "promise," was not entered to benefit Vidimos directly. In fact, Laser Lab apparently was suffering financial difficulties and seeking to increase market share by having Wysong Laser take over its United States systems. A letter sent to Vidimos from Laser Lab on March 5, 1991, indicated that Laser Lab did not have the financial resources to service its U.S. customers adequately. (Vidimos Affidavit, Exh. 3) Vidimos cannot be considered a third-party beneficiary under Michigan law.

Even assuming that Vidimos was a third-party beneficiary to the Agreement between Laser Lab and Wysong Laser, Vidimos could only recover from Wysong based on the obligations and duties that Wysong Laser agreed to perform under the contract. The clear and unambiguous terms of the contract provided that Wysong Laser only agreed to perform Laser Lab's existing service obligations under its express repair or replace warranties. (*See* Sapp Affidavit, Exh. 1, ¶4(g)) Therefore, Vidimos cannot assert its claims for lost wages, lost profits, and other compensatory damages against Wysong. Since Wysong Laser cannot be held responsible to Vidimos for more than it assumed to do under

the Distributorship Agreement, Vidimos has provided no basis for recovery against Wysong Laser even as a third-party beneficiary to the contract.

In addition to its claim of breach of contract against the Wysong companies, Vidimos asserted two new theories of liability in its response to the Wysong companies' motions for summary judgment. For the first time, Vidimos contended that Wysong Laser assumed a duty to Vidimos by its conduct or representations and that Wysong Laser was liable under the theory of promissory estoppel. These theories of recovery were not included in Vidimos' original complaint against Wysong companies. The Seventh Circuit has held that where the timing of newly alleged facts and claims may be prejudicial, the court should not consider them. *Samuels v. Wilder*, 871 F.2d 1346, 1349-50 (7th Cir. 1989). Since Vidimos has not presented any justification for the delay in raising these claims nor shown that the defendants should have been on notice of such claims, this court will not address any facts or claims not raised in Vidimos' complaint.

Since Vidimos has not established that the agreement between Laser Lab and the Wysong companies was made to benefit it directly, Vidimos cannot assert a third-party beneficiary status. As such, Vidimos has no cause of action for breach of contract against either Wysong Laser or Wysong & Miles, and summary judgment is appropriate.

For the reasons set forth above, the two Motions for Summary Judgment filed by the defendants on August 31, 1993, are **GRANTED**. The claims against Wysong Laser Co., Inc. and Wysong & Miles Co. are **DISMISSED**. This

case remains pending as to the claims against Laser Lab Limited, Laser Lab (U.S.A.), and Laser Lab Sales.

ENTERED this 22 day of December, 1993

s/ Andrew P. Rodovich
Andrew P. Rodovich
United States Magistrate Judge